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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-2018**

In re the Marriage of: Elio Fumagalli, petitioner,
Appellant,

vs.

Stacy Lynn Fumagalli, n/k/a Stacy Lynn Duesterhoeft,
Respondent,
County of McLeod, intervenor,
Respondent.

**Filed August 28, 2017
Affirmed
Reyes, Judge**

McLeod County District Court
File No. 43-FA-08-1372

Elio Fumagalli, Sugar Lake, Texas (pro se appellant)

Stacy Lynn Duesterhoeft, Stewart, Minnesota (pro se respondent)

Michael Junge, McLeod County Attorney, Amy E. Olson, Assistant County Attorney,
Glencoe, Minnesota (for respondent county)

Considered and decided by Halbrooks, Presiding Judge; Reyes, Judge; and Florey,
Judge.

UNPUBLISHED OPINION

REYES, Judge

In this child-support dispute, appellant-father argues that the district court
(1) misstated his and respondent-mother's incomes; (2) used an incorrect division of

parenting time when setting child support; (3) selected an incorrect effective date for father's reduced child-support obligation; and (4) failed to address his request that interest stop accruing on his unpaid child support. We affirm.

FACTS

Appellant-father Elio Fumagalli and respondent-mother Stacy Lynn Fumagalli, n/k/a Stacy Lynn Duesterhoeft, were divorced in February 2009. The parties were married for seven years and had two children during the marriage. The judgment and decree dissolving the parties' marriage granted physical custody of the children to mother and set father's monthly child-support obligation at \$1,382. Father was granted reasonable parenting time pursuant to the terms of the judgment and decree.

In approximately February 2012, father began residing in New York. In April 2014, the district court filed an order that eliminated father's parenting time outside of Minnesota. In May 2014, a child-support magistrate (CSM) granted McLeod County's motion to increase father's child-support obligation to \$2,282 per month, applying retroactively to August 2013. Father is an engineer and has worked in that field for over 25 years. Currently, father is unemployed.

In December 2015, father's work project through Resources Global Professionals (RGP) ended after two and one half years. Father began receiving unemployment benefits from the state of New York in the amount of \$1,840 per month in January 2016. Father's employment with RGP officially terminated in March 2016 after he was not assigned to a new project within 90 days of the end of the previous project.

In May 2016, father filed a motion to modify his child-support obligation from the May 2014 order. At the hearing on father's motion, father testified that he submits between one and 20 job applications each week. Mother testified that she assists her sister in operating a daycare and has done so since 2004. Mother further testified that she receives 30% of the daycare's income pursuant to a verbal agreement with her sister. Mother also agreed to have her income calculated at 150% of the minimum wage as it had been calculated in past orders.

A CSM granted father's May 2016 motion with modifications. For the months of June 2016 and July 2016, father's child-support obligation was reduced to \$498 in light of his unemployment benefits, which ended in July 2016 when father received the maximum allotted. Starting August 1, 2016, father's monthly child-support obligation was set at \$1,972. The CSM used father's potential income in the child-support calculation based on the determination that father failed to show a good-faith effort to obtain employment. Father's appeal follows.

D E C I S I O N

On appeal from a CSM's order, this court applies the same standard of review that applies to a district court order. *Hesse v. Hesse*, 778 N.W.2d 98, 102 (Minn. App. 2009). The determination of whether to modify child support is within the CSM's discretion. *See Putz v. Putz*, 645 N.W.2d 343, 347 (Minn. 2002). A CSM abuses her discretion if her decision is against logic and the facts on record. *Id.*

Although the CSM granted father's motion to modify child support with modifications, father asserts that the CSM abused her discretion. We address each of father's arguments below.

I. The CSM's determination of father's and mother's incomes was not clearly erroneous.

A CSM's determination of income must be based in fact, and we review that determination for clear error. *Newstrand v. Arend*, 869 N.W.2d 681, 685 (Minn. App. 2015) (quotation omitted), *review denied* (Minn. Dec. 15, 2015). Whether a parent is voluntarily unemployed is also reviewed for clear error. *Welsh v. Welsh*, 775 N.W.2d 364, 370 (Minn. App. 2009). "A finding is clearly erroneous if the reviewing court is left with the definite and firm conviction that a mistake has been made." *Vangsness v. Vangsness*, 607 N.W.2d 468, 472 (Minn. App. 2000) (quotations omitted).

To determine the presumptive child-support obligation, a CSM must determine the gross income of each parent. Minn. Stat. § 518A.34(a), (b) (2016). "[G]ross income includes . . . potential income under section 518A.32." Minn. Stat. § 518A.29(a) (2016). "If a parent 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." Minn. Stat. § 518A.32, subd. 1 (2016).

A. Father's income

Father argues that the CSM's finding on his income is clearly erroneous, his income for the child-support calculation for August 2016 and onwards should be \$264, and the

CSM erred by determining that father acted in bad faith when he searched only for full-time employment. We disagree.

Here, father has been unemployed since March 2016 and received unemployment benefits from January 2016 to July 2016. Father remains unemployed, despite testifying to submitting at least one and as many as 20 job applications per week. In addition, father testified that he is not considering part-time positions because obtaining such a position would negatively affect his future career potential. The CSM found that father has “made minimal and undocumented efforts to find employment” and that father was vague in his description of his job search in the month leading up to the hearing. In light of these facts, the CSM determined that father “has shown bad faith in not even considering less than full-time employment.” The CSM further determined that father is “voluntarily unemployed or underemployed” and used \$10,000 as father’s potential monthly income starting August 2016.

Father asserts that the CSM should have requested father’s job-search records. While pro se parties may receive some latitude, they are held to the same standards as attorneys. *Fitzgerald v. Fitzgerald*, 629 N.W.2d 115, 119 (Minn. App. 2001). Father had the opportunity to present his job-search records at the hearing, and he did not. See *Eisenschenk v. Eisenschenk*, 668 N.W.2d 235, 243 (Minn. App. 2003) (“A party cannot complain about a district court’s failure to rule in [the party’s] favor when one of the reasons it did not do so is because that party failed to provide the district court with the evidence that would allow the district court to fully address the question.”), *review denied* (Minn. Nov. 25, 2003).

The record reveals that father is capable of receiving a high salary as his 2014 and 2015 W2s show \$131,561 and \$132,193, respectively, as Medicare wages and tips. Accordingly, the CSM's determination that father is unemployed or underemployed was not clearly erroneous, and the CSM did not err in using father's potential income in the child-support calculation. See *Veit v. Veit*, 413 N.W.2d 601, 605-06 (Minn. App. 1987) ("Here, because appellant is unemployed, it is impracticable to determine her actual income. Therefore, the trial court properly determined appellant's earning capacity based on her prior work history."). In addition, the CSM's determination that father's efforts to find employment were in bad faith is not clearly erroneous.

Citing to *Haefele v. Haefele*, 837 N.W.2d 703 (Minn. 2013), father also argues that the CSM erred by requesting that father disclose his 401k assets, claiming that "assets are not used to determine child support." Father's argument lacks merit. *Haefele* holds that a parent's income from joint ownership in a closely held corporation is included in the parent's self-employment or business-operation income. 837 N.W.2d at 711. This holding does not support appellant's assertion. Moreover, when modifying child support, a CSM must take into consideration "all earnings, income, circumstances, and resources of each parent, including real and personal property, but excluding income from excess employment of the obligor or obligee." Minn. Stat. § 518A.43, subd. 1(1) (2016). Thus, a CSM should consider a 401k when determining whether to modify child support.¹

¹ Father also argues that federal and Minnesota law limit the percentage of income that may be garnished from his wages. Father did not make this argument to the CSM; therefore, it is not properly before this court. *Thiele v. Stich*, 425 N.W.2d 580, 582-83 (Minn. 1988).

Kuronen v. Kuronen, 499 N.W.2d 51, 54 (Minn. App. 1993), *review denied* (Minn. June 22, 1993).

B. Mother's income

Father argues that the CSM should have calculated mother's annual income at \$49,000 based on her testimony at a March 2012 hearing, rather than setting mother's income at 150% of the minimum wage. We are not persuaded.

At the hearing on father's motion to modify his child-support obligation from the May 2014 order, mother testified that she receives 30% of the daycare's income but the daycare's income was not provided. The CSM found mother's income for the purpose of calculating child support to be 150% of the minimum wage, or \$2,338 per month and \$28,056 per year, because there was insufficient information to determine mother's actual income. *See* Minn. Stat. § 518A.32, subd. 2(3) (2016).

Father asserts that the daycare receives \$90,000 annually. Under this theory, wife's annual income would be \$27,000. This figure is inconsistent with husband's claim that wife's income should be \$49,000. Further, wife's 2014 and 2015 W2s show annual incomes of \$12,326 and \$13,512, which correspond to monthly incomes of approximately \$1,027 and \$1,126. The CSM's decision to impute income to wife is to husband's benefit because the imputed value is greater than the income reported on wife's W2s and wife's income if it is calculated as 30% of the daycare's income. Because the daycare's income has not been verified and mother testified that it fluctuates, the CSM's finding on mother's income is not clearly erroneous.

II. The CSM's finding on father's parenting-time percentage was not clearly erroneous.

Father argues that the CSM clearly erred by finding that father's parenting time was less than 10% where the 2009 judgment and decree of divorce set his parenting time between 10% and 45%. Father also asserts that the removal of the parenting-time expeditor (PTE) from this case negates the CSM's finding. We disagree.

The CSM found father's parenting time to be less than 10% based on the most recent order addressing parenting time dated April 2014, which eliminated father's parenting time outside of Minnesota. Therefore, as this court previously concluded in a March 2017 opinion, the CSM's finding that father's parenting time was less than 10% is not clearly erroneous. *See Fumagalli v. Fumagalli*, No. A16-0735, 2017 WL 1046215, at *3-4 (Minn. App. Mar. 20, 2017). Further, father's assertion that the removal of the PTE from this case affects his parenting-time percentage lacks merit. The PTE was relieved subsequent to the order on appeal, and the removal of the PTE did not nullify the parenting time set in the April 2014 order.

III. The CSM acted within her discretion in declining to reduce father's child-support obligation in May 2016.

Father contends that the CSM should have selected May 2016 instead of June 2016 as the effective date of the reduction in his child-support obligation. We are not persuaded.

A CSM has discretion to set the start date of a reduction in child support. *See Finch v. Marusich*, 457 N.W.2d 767, 770 (Minn. App. 1990). "A modification of support or maintenance . . . may be made retroactive only with respect to any period during which the

petitioning party has pending a motion for modification but only from the date of service of notice of the motion on the responding party.” Minn. Stat. § 518A.39, subd. 2(f) (2016).

Here, the CSM reduced father’s child-support obligation for June 2016 and July 2016. The CSM’s decision is in accordance with the statute because father served his motion on May 26. Therefore, the CSM acted within her discretion when she did not reduce father’s child-support obligation earlier than June 2016.

IV. The CSM ruled on father’s request to stop all interest charges on child-support arrears.

Father argues that the CSM abused her discretion because she did not rule on his request that interest charges on his child-support arrears dating back to December 2015 be removed. We disagree.

The CSM broadly dismissed father’s remaining motions and requests in her order by stating that “[a]ll other motions/requests found in the [parties’] motions . . . are denied.” Accordingly, the CSM addressed father’s request, and father’s argument on appeal fails.

Affirmed.