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Bonnalynn J. K. Wos Aarnio (Kramer), petitioner, Respondent, vs. James E. Aarnio, Appellant.

C9-02-376

COURT OF APPEALS OF MINNESOTA

2002 Minn. App.

September 24, 2002, Filed

NOTICE: [*1] THIS OPINION WILL BE UNPUBLISHED AND MAY NOT BE CITED EXCEPT AS PROVIDED BY MINNESOTA STATUTES.

PRIOR HISTORY: Winona County District Court. File No. F08133466.

DISPOSITION: Affirmed.

COUNSEL: Charles E. MacLean, Winona County Attorney, Nancy L. Bostrack, Assistant County Attorney, Winona, MN (for respondent).

Steven R. Peloquin, New York Mills, MN (for appellant).

JUDGES: Considered and decided by Schumacher, Presiding Judge, Klaphake, Judge, and Shumaker, Judge.

OPINION BY: GORDON W. SHUMAKER

OPINION

UNPUBLISHED OPINION

GORDON W. SHUMAKER, Judge

Appellant challenges the district court's conclusion that appellant's failure to pay child support was willful; the date the court selected for vacating interest on support arrearages; and the income amount on which the court computed appellant's support obligation. Because the district court properly exercised its discretion on each of these rulings, we affirm.

FACTS

In the parties' marriage dissolution on February 8, 1982, the court awarded to respondent sole legal and physical custody of the parties' then two-year-old daughter, K.T.A., and ordered appellant to pay monthly child support of $ 600.

Soon after the dissolution, [*2] appellant disappeared and had no contact with his daughter or with respondent for more than nine years.

When appellant's whereabouts were determined, the district court entered judgment against him on May 31, 1991, in the sum of $ 35,810 for child-support arrearages from February 1, 1982, through February 28, 1983, and June 1, 1988, through April 30, 1991. The court also awarded judgment to Winona County in the amount of $ 28,475 for child-support assistance the county had provided from March 1, 1983, through May 31, 1988.

Respondent died on January 18, 1996. The district court awarded sole legal physical custody of K.T.A. to her maternal grandmother and modified appellant's child-support obligation to $ 742 a month, retroactive to February 1996. The court found that the modified support award was a deviation from the child-support guidelines that took into consideration K.T.A.'s extraordinary medical expenses because of her allergies and asthma and the fact that appellant had another minor child in his household.

Appellant and Winona County entered a stipulation on May 29, 2001, renewing the 1991 judgments and providing for interest. Under the stipulation, respondent's estate was [*3] entitled to $ 35,810 and interest of $ 858.25 from May 31, 1991, through May 29, 2001; and Winona County was entitled to $ 28,475, with interest of $ 16,010.87 from May 31, 1991, to May 29, 2001.

On December 21, 2001, the district court found that appellant's failure to pay child support during his absence was willful and that appellant failed to show circumstances that would support a modification of support.

Appellant moved for amended findings. On February 26, 2002, the court amended its findings by vacating child-support interest that had accrued since May 18, 2001, the date on which appellant moved for a modification of support and notified all necessary parties.

Appellant challenges the district court's orders of December 21, 2001, and February 26, 2002.

DECISION

This court will reverse a district court's order modifying child support "only if we are convinced that the court abused its broad discretion" and reached a "clearly erroneous conclusion that is against the logic and facts on [the] record." *Gully v. Gully, 599 N.W.2d 814, 820 (Minn. 1999)* (alteration in original) (quotation omitted).

1. *Modification of Child Support Order/Changed* [*4] *Circumstances*

Appellant argues that the district court erred in finding that he did not meet the burden of showing that he is entitled to a modification of the 1982 child-support order. Appellant argues that evidence existed showing that physical and emotional disabilities prevented him from obtaining employment, and, thus, his failure to pay child support from 1982 to 1987 was not willful.

The law in effect at the time the child-support arrearages accrued governs this case. *See LaValle v. LaValle, 430 N.W.2d 224, 229-30 (Minn. App. 1988)* (courts are to consider the modification motion under the statute effective at the time the arrearages accrued); *Bruner v. Bruner, 429 N.W.2d 679, 682-83 (Minn. App. 1988)* (in a motion for modification of child support, the court is to consider the motion in the light of the statute effective at the time the arrearages accrued), *review denied* (Minn. Nov. 30, 1988).

Before the applicable statute was amended effective June 13, 1987, the law governing retroactive modification of child support provided that a decrease in child support may be made retroactive only upon a showing that the failure to pay child [*5] support was not willful:

> A modification which decreases support or maintenance may be made retroactive only upon a showing that any failure to pay in accord with the terms of the original order was not willful.

Minn. Stat. § 518.64, subd. 2 (1986).

[1] A child-support order may be modified only upon the showing of substantially increased or decreased earnings of a party, which makes the terms of the order unreasonable or unfair. *Id.* Appellant carries the burden of proof. *Bruner, 429 N.W.2d at 683*.

> 1 In 1987, the statute was modified to allow a retroactive modification of child support only to the date the motion for modification was pending and removed the willfulness requirement. 1987 Minn. Laws ch. 403, art. 3, § 90.

In its order, the district court found that appellant refused to pay child support in 1982, and income withholding was instituted. However, appellant quit his job in September 1982, before any income withholding took effect. The district court [*6] also found that appellant made sporadic, minimal child-support payments until September 1982, made no child-support payments after September 1982, and that Winona County was not able to locate appellant to enforce the child-support order until 1991.

Finally, the district court found that, although appellant claims that he was forced to choose between resigning or being fired from his job because of his medical condition, he did not submit any documentation corroborating his resignation in 1982 or showing that his medical condition precluded him from working from 1982 to 1987. The court found that appellant's failure to pay child support from 1982 to 1987 appeared willful.

The evidence supports the district court's findings. Appellant offered no evidence that his medical condition caused his resignation and thereafter precluded him from securing replacement employment.

But the evidence does show that appellant objected to the amount of child support ordered, did not pay child support, and quit his employment with the FAA before income withholding could be instituted. Thus, the determination that appellant willfully failed to pay child support, or whether or not appellant encountered [*7] a substantial change in circumstances, rests on witness credibility. Judging the credibility of witnesses and the weight to be given to their testimony rests within the province of the finder of fact. *In re Welfare of R.T.B.. 492 N.W.2d 1, 3 (Minn. App. 1992)*. We find no error in the district court's denial of appellant's motion to modify his child-support obligation.

2. *Voluntary Unemployment/Imputation of Income*

Appellant argues that imputing income to him based on his education, training, experience, and mental and physical disabilities is inappropriate in this case because it is impracticable to determine what he could have earned from 1982 to 1987. Thus, he contends, the imputation of his income should have been based on the minimum-wage imputation standard. Although appellant raised this issue in his motion to modify the judgment, the district court did not consider it in its December 21, 2001, order. Appellant did not subsequently raise this issue in his motion for amended findings, and the district

court did not consider it in its February 26, 2002, order. This court will generally not consider matters not argued and considered in the court below. [*8] *Thiele v. Stich, 425 N.W.2d 580, 582 (Minn. 1988)*. Nevertheless, the record shows that appellant's income was not "impracticable" to determine on the basis of his income history, education, job skills, and availability of employment from 1982 to 1987, and the court did not err by refusing to use the minimum-wage standard in determining appellant's income for child support.

3. *Vacation of Interest on Child-Support Arrearages*

Appellant argues that the district court erred in determining the effective date of the vacation of accrued interest on child-support arrearages. He argues that he served his first motion on January 5, 1999 on Winona County but did not serve it on K.T.A. because respondent's estate had not yet been determined. The decree of descent was filed with the court on July 9, 1999, and on May 18, 2001, appellant served his second motion on Winona County. Appellant's second motion was not served on K.T.A. until July 11, 2001. Winona County concedes that the interest owed to it by appellant should be vacated from the May 18, 2001, motion date.

Appellant argues that the district court's decision not to allow him to renew his motion effectively [*9] prohibited him from terminating the accrual of interest on the judgments from the date of his first motion. He argues incorrectly that the district court held the motion in "abeyance" pending a determination of heirship; rather, the district court's first correspondence to the parties merely states that it did not believe that all interested parties were served. On March 3, 1999, in response to additional correspondence relating to the motion, the court states that:

I do not feel that there is anything properly before the Court at this time and I do not regard the matter as being under advisement. If there is any issue that needs to be heard before the Court, it will be up to the party requesting relief to properly, upon notice to the opposing party or parties, bring the matter before the Court.

The district court did not err in denying appellant's request to "renew" his motion, since the motion was not properly before the court when appellant filed the motion on January 5, 1999, without serving all parties. *See Singer v. Mandt, 211 Minn. 50, 54, 299 N.W. 897, 899 (1941)* (finding that it was error for district court to consider motion that had not been legally [*10] served on all parties).

Appellant also argues that, because he was otherwise entitled to seek the retroactive vacation of interest on his child-support arrearages, the district court erred in not retroactively vacating his child-support obligation from January 5, 1999. But the statute states that, upon proper notice, a modification of the interest that accrued "*may* be made retroactive," but only from the date of service of notice of the motion. Minn. Stat. *§ 518.64, subd. 2(d)* (2000) (emphasis added). Because the word "may" is defined as "permissive," it is within the district court's discretion to set the effective date of a child-support modification. *Kemp v. Kemp, 608 N.W.2d 916, 920 (Minn. App. 2000)*. Appellant served his motion on Winona County on May 18, 2001, but the record indicates that he did not serve K.T.A. until July 11, 2001. Despite these facts, the district court still vacated the accrued interest on both K.T.A.'s and Winona County's judgments effective May 18, 2001. Upon these facts, and because K.T.A. does not object to the May 18, 2001, effective date despite her lack of notice, the district court did not abuse its [*11] discretion.

Lastly, appellant argues that at the very least he should be entitled to have interest on his child-support arrearages vacated effective January 5, 1999. However, after appellant filed the motion on January 5, 1999, he took no action until he re-filed the motion on May 18, 2001. This could be construed as an abandonment of the motion, and the district court did not err in retroactively vacating accrued interest effective May 18, 2001, rather than January 5, 1999. *See Hicks v. Hicks, 533 N.W.2d 885, 886 (Minn. App. 1995)* (obligor deemed to have abandoned motion and not entitled to retroactive modification to May 1992, when, after filing motion in May 1992, conducted no discovery, requested no hearings, presented no evidence to support motion, and pursued motion no further until about two years later).

Affirmed.