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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1405**

In re the Marriage of:

Terri Lyn Swart, petitioner,
Respondent,

Kandiyohi County,
Respondent,

vs.
Tracy Donald Swart,
Appellant.

**Filed March 20, 2017
Affirmed in part and reversed in part
Rodenberg, Judge**

Kandiyohi County District Court
File No. 34-FA-12-359

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Considered and decided by Ross, Presiding Judge; Stauber, Judge; and Rodenberg, Judge.

UNPUBLISHED OPINION

RODENBERG, Judge

In this child-support dispute, appellant challenges the district court's order denying his motion to modify child support, arguing that the district court abused its discretion by (1) relying on the parties' agreement that neither would move to modify child support before January 1, 2018 in finding that there has not been a substantial change in circumstances rendering the existing support obligation unreasonable and unfair, (2) finding that appellant failed to prove his income as of the motion-hearing date, and (3) awarding respondent attorney fees. We affirm in part and reverse in part.

FACTS

Appellant-father Tracy Swart and respondent-mother Terri Swart married in 1998 and have four minor children together. The parties separated in 2012. Father's temporary basic child-support obligation was set at \$1,609 per month based on his gross income. In August 2013, the district court entered a judgment and decree dissolving the parties' marriage, awarding the parties joint legal custody of the children, and awarding mother sole physical custody of the children. Father was awarded parenting time every other weekend and every other Wednesday. The judgment and decree continued father's basic child-support obligation at \$1,609 per month.

Several months later, father moved for a modification of the child-support order based on changed circumstances.¹ In May 2014, a child support magistrate (CSM)

¹ Kandiyohi County originally brought the motion to modify child support, but took no position on the amount at which basic child support should be set. Father argued that a

concluded that father's gross income had increased to \$7,009 per month, but also found that the increase did not create a substantial change in circumstances warranting modification of father's child-support obligation.

Father moved the district court for review of the CSM's order. Before a decision was made by the district court, the parties reached a mediated agreement concerning child support. On November 6, 2014, the district court dismissed father's motion for review and issued an order incorporating the parties' agreement that set father's basic child-support obligation at \$1,439 per month.² The parties also agreed to limit their ability to modify child support. The resulting order provides:

Based upon the parties' agreement, neither party shall be allowed to bring a motion for modification of child support prior to January 1, 2018. Consideration has been given by each party and the inability to request a motion for modification of support is intended to cover all circumstances under which a party would usually be allowed to bring a motion to modify child support including but not limited to a change in either party's income, a change in the parenting time adjustment or a change in custody.

In June 2015, father moved for sole physical custody of two of the children. In February 2016, the parties agreed to modify custody, and the district court awarded the parties joint physical custody of those two children, retained joint legal custody as before, and ordered that the primary residence of those two children would be with father. The

reduction in his child-support obligation was warranted due to decreased income. The county disagreed that father had shown a substantial change.

² This monthly obligation appears to have been based on a gross income amount of \$5,662 per month.

parties' 2016 stipulation acknowledged the earlier November 2014 order and agreement not to move for a modification of child support.

One month later, father moved for modification of his child-support obligation, citing the change of custody and residence as justification for the proposed reduction. Father argued that the limitation on future modifications from the November 2014 order violates public policy. Mother opposed the motion and moved for attorney fees and costs.

A hearing was held before a CSM. Father's 2015 tax returns were received in evidence. An accountant for mother testified that father's tax returns were not a reliable basis on which to calculate father's actual income because of the intertwined finances of several business entities owned and controlled by father.³

The CSM denied father's motion. The CSM found that father had not met his burden of demonstrating his current income. He submitted his 2015 tax returns, but the CSM found that such returns "are not always a reliable indication of a [party's] income," and father did not produce an accountant to explain his finances. Having concluded that father did not demonstrate his current income, the CSM considered father's gross income at the previously calculated \$7,009 per month. On that basis, the CSM calculated the obligation that mother would owe to father for the two children residing with father. Ultimately, the CSM concluded that father had not demonstrated a substantial change in circumstances that rendered the current obligation unreasonable or unfair.⁴ The CSM

³ Neither party provided a transcript of the modification hearing. We are therefore left to accept the CSM's findings of fact concerning what testimony was presented at the hearing.

⁴ The CSM's conclusions of law include contradictory statements. One conclusion is that there has been a substantial change in circumstances that renders the child-support

further noted that the parties' agreement not to bring motions to modify child support until 2018 was not a complete waiver of child support; rather, it was an agreement to reduce father's support obligation, and an attendant agreement by each party not to bring a new motion until 2018. The CSM ordered father to pay mother's attorney fees of \$3,172 because mother "incurred fees and costs that she should not have incurred had [father] followed the agreement made."

Father moved the district court to review the CSM's order. He objected to the CSM's finding that he had not proved his income, the CSM's conclusion concerning the agreement not to modify, and the CSM's conclusion awarding mother attorney fees. The district court affirmed the CSM's factual findings and legal conclusions.

This appeal follows.

D E C I S I O N

A party may move the district court to modify an existing child-support obligation. Minn. Stat. § 518A.39, subd. 1 (2016). The district court may modify a child-support order if the moving party shows (1) a substantial change in circumstances that (2) renders the existing order unreasonable and unfair. *Id.*, subd. 2(a) (2016); *In re Dakota Cty.*, 866 N.W.2d 905, 909 (Minn. 2015). The moving party must prove both a substantial change

obligation unreasonable and unfair, and another is that there has not been such a change. This appears to be a clerical error. It is apparent from the order and memorandum that the CSM concluded that there has not been a substantial change in circumstances that renders the order unreasonable and unfair. We therefore disregard the CSM's apparently spurious third conclusion of law to the contrary.

in circumstances and that the existing order is unfair and unreasonable because of the change. *Rose v. Rose*, 765 N.W.2d 142, 145 (Minn. App. 2009).

If a district court affirms a CSM's decision, the CSM's decision becomes the decision of the district court, and we review the CSM's decision as if it had been made by the district court. *Id.* A district court's decision to modify child support will be reversed on appeal only if the district court abused its discretion by resolving the matter in a manner contrary to logic and the facts on the record or by misapplying the law. *Gully v. Gully*, 599 N.W.2d 814, 820 (Minn. 1999); *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988).

Because father did not provide this court with a transcript of the hearing before the CSM,⁵ our review is limited to determining whether the district court's factual findings support the conclusions of law. *Bormann v. Bormann*, 644 N.W.2d 478, 481 (Minn. App. 2002). "A reviewing court, however, is not bound by and need not give deference to a trial

⁵ A district court is permitted to review the audio recording of a child-support hearing as part of its review of a CSM's order. Minn. R. Gen. Pract. 377.09, subd. 3 (explaining that the record on a motion to review a CSM's decision includes "any exhibits and affidavits filed, and, where a transcript has not been filed, may be based upon all or part of the audio or video recording of the hearing"). We have confirmed that a recording of the hearing exists. That recording could have been used by the district court as part of its review, but father indicated in his statement of the case on appeal that no transcript was necessary to review the issues presented by his appeal. Accordingly, no transcript of the hearing is available for our review of the factual findings. Under Minn. R. Gen. Pract. 377.09, subd. 3, when a party seeks review of a decision made in the expedited child support system, "[t]he review by the child support magistrate or district court . . . may be based upon all or part of the audio or video recording of the hearing." Under the appellate rules, however, for "all cases," the record on appeal is divided into three categories: (a) "[t]he documents filed in the trial court[;]" (b) "the exhibits[;]" and (c) "the transcript of the proceedings, if any[.]" Minn. R. Civ. App. P. 110.01. Father's failure to provide a transcript precludes our full review of the evidence presented to the CSM concerning father's income, a factual finding that father directly challenges on appeal.

court's decision on a purely legal issue.” *Mesembourg v. Mesembourg*, 538 N.W.2d 489, 492 (Minn. App. 1995).

I. Substantial change in circumstances

Father argues that the district court relied on the parties' agreement not to modify child support in concluding that there had not been a substantial change in circumstances which rendered the current obligation unreasonable and unfair, and that this was an abuse of discretion because it was a misapplication of law and the agreement violates public policy.

“The best interests of minor children are served by ensuring that they receive adequate support consistent with the financial abilities of their mothers and fathers to provide that support.” *Mulroy v. Mulroy*, 354 N.W.2d 66, 69 (Minn. App. 1984). Although spousal maintenance may be waived, “such [a] waiver is not permitted in the case of child support.” *Id.*

The Minnesota Supreme Court has stated:

The basic right of minor children to support by the parents may not be affected by any agreement between the parents or third persons. Courts will not be bound by an agreement between parents affecting the rights of minor children with respect to support, but will be controlled by the welfare of the child as the paramount consideration.

Tammen v. Tammen, 289 Minn. 28, 30, 182 N.W.2d 840, 842 (1970). In *Tammen*, the supreme court held that a district court does not abuse its discretion in amending a stipulated child-support obligation where the record “reasonably and clearly supports a finding that circumstances have so materially changed that the modification is fair and

equitable.” *Id.* In reaching its decision, the supreme court said that stipulations are “purely advisory to the court and do not limit its discretionary power to determine whether a future change in circumstances warrants revision, but they are entitled to considerable evidentiary weight which will make the court more reluctant to modify the original decree.” *Id.* (quotation omitted).

Citing *Tammen*, we later held in *Aumock v. Aumock* that an agreement to waive child support is not enforceable because it is contrary to public policy. 410 N.W.2d 420, 421 (Minn. App. 1987) (“Any agreement between the parents waiving child support cannot be binding on the trial court, which must be guided primarily by a concern for the best interests of the children.”). The parties in *Aumock* had agreed to a complete waiver of child support, but the agreement was challenged several years later when the incomes of the parents dramatically shifted. *Id.* at 421. We stated, “The non-custodial parent has an obligation to commit a certain amount of his or her income to the child.” *Id.* We noted that the parents “may have been willing to permanently bargain away child support when the stipulation was prepared, [but] the rights of the minor children are not subject to determination through such a bargaining process.” *Id.*

Mother argues, and the district court concluded, that the agreement between the parties to limit motions for modifications until 2018 is not a complete waiver of child support, and is instead a valid and binding agreement concerning the amount of support for a prescribed time period. Mother argues that *O’Donnell v. O’Donnell*, 678 N.W.2d 471 (Minn. App. 2004), supports upholding stipulated agreements concerning child support where changes in circumstances are foreseeable by the parties.

In *O'Donnell*, we noted that a stipulation that fixes child-support rights and obligations “does not bar later consideration of whether a change in circumstances warrants a modification.” 678 N.W.2d at 475. In *O'Donnell*, the parties stipulated to a downward departure from the child-support guidelines, and the district court found the deviation to be in the best interests of the children. *Id.* at 477. Five months after the stipulation, the father moved for modification because of increased expenses related to his custody of the children. *Id.* at 473-74. The district court modified child support to the guideline amount. *Id.* at 474. We reversed the district court’s modification, finding that the expenses encountered by the father were ordinary expenses insufficient to support a modification in light of the stipulated agreement and absent a claim that the children’s best interests necessitated a change in the support terms. *Id.* at 476. We held that a “stipulation is one factor to be considered in modification motions,” and emphasized that “child support relates to nonbargainable interests of children and is less subject to restraint by stipulation than are other dissolution matters.” *Id.* (quotation omitted).

These cases demonstrate that an agreement concerning child support will not be binding on the courts, *Tammen*, 289 Minn. at 30, 182 N.W.2d at 842, will not prevent subsequent motions to modify support, *O'Donnell*, 678 N.W.2d at 475; *Aumock*, 410 N.W.2d at 421, but may be considered as a factor concerning a motion to modify a stipulated support agreement based on a substantial change in circumstances, *O'Donnell*, 678 N.W.2d at 475. *Cf. McNattin v. McNattin*, 450 N.W.2d 169, 171 (Minn. App. 1990) (considering an agreement concerning child support because it represented “the parties’ acquiescence in a settlement”). Whether a modification is in the best interests of the

children, or is based on the needs of the children, is a paramount concern of a court considering whether to modify a stipulated order. *Tammen*, 289 Minn. at 30-31, 182 N.W.2d at 842; *O'Donnell*, 678 N.W.2d at 476-77; *Aumock*, 410 N.W.2d at 421.

The district court concluded that, under section 518A.39, subd. 2(b) (2016), “there has not been a substantial change in circumstances *that renders the existing child support order unreasonable and unfair.*” (Emphasis added.) As discussed above, the parties’ agreement not to move for a modification until 2018 would not prohibit either party from bringing a motion to modify child support; nor would it prohibit the district court from modifying child support if it found a substantial change in circumstances that rendered the existing child-support order unreasonable and unfair. But courts may consider a stipulation as one factor in whether there has been a change in circumstances, and in considering whether a change renders an order unreasonable and unfair. *See O’Donnell*, 678 N.W.2d at 476-77 (holding that a stipulated judgment, with findings, may rebut a presumption of unfairness and unreasonableness, and that a change in circumstances did not occur where the moving party did not claim the children’s needs necessitated a change and where the increased expenses were foreseeable).

At oral argument, father conceded that he produced no argument or evidence concerning the adequacy of the existing arrangement to provide for the needs of the two children residing with him. *See Frank-Bretwisch v. Ryan*, 741 N.W.2d 910 (Minn. App. 2007) (“[T]he fairness and reasonableness of the [child-support order] goes to matters beyond the interests of each parent, to the paramount consideration of the child’s best interests. This observation becomes critical in circumstances . . . when the primary

argument against modification regards the earlier stipulation of the parties . . .”). While father may have demonstrated a change in circumstances, given the change in residence of two children, he has not demonstrated on appeal that the district court erred in concluding that there was no resultant unreasonableness and unfairness. Father offered no evidence concerning the needs of the children, or that any increased expenses attendant to the custody change required modification.

Applying the rebuttable presumption in section 518A.39, subdivision 2(b), the district court acted within its discretion in finding that the parties precisely contemplated the present circumstances by their agreement not to move for modification before 2018 as a part of their settlement of these disputes concerning child support. Its implicit conclusion that the parties’ contemplation of this circumstance rebuts the presumption of unreasonableness and unfairness that would otherwise apply is a sufficient basis for denying father’s motion. Minn. Stat. § 518A.39, subd. 2(b)(1) (providing that it is presumed to be a substantial change in circumstances when application of the child-support guidelines results in a 20% and \$75 difference in monthly support, but that the presumption of unreasonable and unfairness may be rebutted).

II. Father’s income

Father challenges the district court’s findings concerning his income. The district court found that father’s income was not discernable from his tax returns because the tax returns were not dispositive of father’s income absent further explanation. The district court then used father’s income as established in May 2014 for purposes of examining whether there had been a change in circumstances, despite the existence of an intervening

income stipulated to by the parties. Mother argues that it was not an abuse of discretion for the district court to determine that father's income had not changed from the amount calculated by the CSM in May 2014.

A party moving to modify child support must provide supporting documents, including "a financial affidavit, disclosing all sources of gross income," including statements of receipts and expenses from a self-employed person. Minn. Stat. § 518A.28(a) (2016); *see also* Minn. Stat. § 518A.30 (2016) ("[I]ncome from self-employment or operation of a business" for support purposes is defined as "gross receipts minus costs of goods sold minus ordinary and necessary expenses required for self-employment or business operation.>"). "The court may consider credible evidence from one party that the financial affidavit submitted by the other party is false or inaccurate." Minn. Stat. § 518A.28(c) (2016). As the district court accurately noted, taxable income is not always a reliable indication of income for the purpose of setting child support, and expert testimony may be necessary to estimate income accurately. *Freking v. Freking*, 479 N.W.2d 736, 740 (Minn. App. 1992); *Otte v. Otte*, 368 N.W.2d 293, 297 (Minn. App. 1985).

While we recognize that father's income may have been difficult to ascertain after mother's accountant testified, the district court was required to establish the current income of the parties to determine whether there had been a substantial change in circumstances. *Martin v. Martin*, 382 N.W.2d 920, 922 (Minn. App. 1986). And using the May 2014 income rather than the stipulated income of \$5,662 from the November 2014 order was at least unusual, and probably erroneous without a more complete explanation. However,

even if it was error to use the gross income amount from May 2014, that error was harmless, because it would not change the conclusion that father had failed to show that the existing support obligation is unreasonable and unfair. *See Bormann*, 644 N.W.2d at 482 (“[A] finding of the lack of either threshold condition for modification renders a finding on the other threshold condition unnecessary.”); *see also* Minn. R. Civ. P. 61 (requiring that harmless error be ignored).

Despite the district court’s imperfect findings and conclusions, father has not shown reversible error. In significant part, his failure to provide the CSM with sufficient evidence of his income, and his failure to provide a transcript on appeal, leaves us unable to discern reversible error.

III. Attorney fees

Finally, father argues that the district court abused its discretion in awarding conduct-based fees because he had a legitimate legal basis to challenge the child-support order, despite his earlier agreement not to move for a modification. Mother argues that the district court was within its discretion on this record to have ordered either conduct-based or need-based fees.

The CSM’s award of fees was based on mother’s having incurred fees and costs in defending against father’s motion “that she should not have incurred had [father] followed the agreement made.” The district court affirmed this award on review.

We review an award of attorney fees under the abuse-of-discretion standard. *Gully*, 599 N.W.2d at 825. The district court shall award need-based costs if it finds that certain statutory requirements are met. Minn. Stat. § 518.14, subd. 1 (2016). A lack of specific

findings on the statutory factors will not be fatal to a need-based award if the district court's order reasonably implies that the relevant factors were considered, and the district court had familiarity with the case and access to the parties' financial records. *Geske v. Marcolina*, 624 N.W.2d 813, 817 (Minn. App. 2001). Here, the order for attorney fees included none of the required findings for a need-based award and it is not apparent from the order that the district court considered the relevant factors. Contrary to mother's assertion, an award on the basis of mother's need appears to us not to have been contemplated by the district court. The district court intended to award conduct-based fees.

Conduct-based fees may be awarded "against a party who unreasonably contributes to the length or expense of the proceeding." Minn. Stat. § 518.14, subd. 1; *see Baertsch v. Baertsch*, 886 N.W.2d 235, 238-39 (Minn. App. 2016) (providing examples of conduct that may justify an award, such as noncompliance with discovery, pursuit of frivolous or bad-faith claims, or behavior occurring during the litigation process). The district court must make findings explaining its award of conduct-based fees. *Brodsky v. Brodsky*, 733 N.W.2d 471, 477 (Minn. App. 2007).

Without explaining how father unreasonably contributed to the length or expense of the proceeding, the district court's award cited only father's motion having been in contravention of the parties' earlier agreement. The district court's analysis amounted to a conclusion that any modification motion under these circumstances is ipso facto a sufficient basis for an award of conduct-based fees. As discussed above, an agreement concerning motions to modify child support is not necessarily binding, the children's best interests being the courts' paramount concern. As such, the mere making of the

unsuccessful motion cannot justify the award. *See Baertsch*, 886 N.W.2d at 238 (noting that conduct-based fees are not tied to whether a party prevailed in the action). We therefore reverse the award of attorney fees.

Affirmed in part and reversed in part.