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Minn. Stat. § 480A.08, subd. 3 (2018).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-2117**

In re the Marriage of:
Erika Lynn Huerta, nka Erika Lynn Mazzitello, petitioner,
Respondent,

vs.

Fernando Huerta,
Appellant,

and

Washington County,
Intervenor.

**Filed March 9, 2020
Affirmed in part, reversed in part, and remanded
Ross, Judge**

Washington County District Court
File No. 82-FA-13-4614

Erika Mazzitello (pro se respondent)

Jennifer M. Moore, Moore Family Law, P.A., Plymouth, Minnesota (for appellant)

Considered and decided by Jesson, Presiding Judge; Ross, Judge; and Smith, John,
Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to
Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

ROSS, Judge

Fernando Huerta appeals from the district court's denial of his motion to modify his spousal-maintenance obligation to Erika Mazzitello. Huerta based his motion to modify on Mazzitello's cohabitation with another man and on changes in Huerta's and Mazzitello's incomes. The district court denied the motion, concluding that Mazzitello would suffer a severe economic impact if her cohabitation were to end and imputing additional income to Huerta. We hold that the district court did not abuse its discretion by denying modification based on Mazzitello's cohabitation. But because the district court misapplied the law and made unsupported factual findings regarding Huerta's income, we reverse in part and remand for additional findings on changes in the parties' incomes.

FACTS

Fernando Huerta and Erika Mazzitello divorced in May 2015, ending a 12-year marriage. The district court imputed monthly income to Huerta in the amount of \$7,000 based on his previous earnings as a self-employed cable installer. The district court found that Mazzitello was unemployed, was receiving cash and food assistance, and was unable to work while caring for the parties' minor children and completing her degree. Based on these findings, the district court determined that Mazzitello was in need of spousal maintenance, and it ordered Huerta to pay Mazzitello \$900 per month for five years.

Huerta moved to decrease his spousal-maintenance obligation in June 2017. His bases for modification were Mazzitello's cohabitation with another man, Huerta's decreased income, and Mazzitello's increased income. The district court conducted an

evidentiary hearing where Huerta and Mazzitello testified. Huerta introduced numerous exhibits, including tax returns, pay stubs, and budget records.

Mazzitello testified that she was cohabiting with her boyfriend. She said that she had moved to Michigan shortly after the divorce and had been living with the man since August 2015. She stated that she had no plans to move away from him but that she did not intend to marry him because she had “[b]een married once” and was “not doing it again.” Mazzitello also testified that she was working 35 hours a week and submitted pay stubs reflecting an hourly rate of \$16.17. Based on that evidence, the district court calculated her monthly income to be approximately \$2,460. Mazzitello’s boyfriend’s 2016 tax return was introduced as well, and it showed his adjusted gross income to be \$64,880. The district court also received into evidence documents showing Mazzitello’s monthly expenses to be \$1,823.90 and her boyfriend’s monthly expenses to be \$2,340.75 (excluding child support).

Huerta testified as to his current income. He maintained that, despite the divorce court’s imputation of gross income to him at \$7,000 per month, he never in fact earned that much at that time or since. He introduced tax returns showing his annual gross income as \$1,313 in 2015, \$42,523 in 2016, and \$19,790 in 2017. Huerta further testified that he was currently employed by S&F Communications Inc., a cable installer, and that he earned \$15 per hour. He submitted his pay stubs from S&F for September 2017 through January 2018. Based on his testimony, the district court calculated Huerta’s monthly gross income as approximately \$2,600 and his annual gross income as \$31,200.

Huerta testified that S&F was owned by his girlfriend and cohabitant, and he acknowledged that the “S” and “F” in the company’s name stood for their first names. But

Huerta denied owning any interest in the business, insisting that he just worked as an employee. Huerta submitted his girlfriend's 2015 and 2016 tax returns, which listed her adjusted gross income as \$40,485 and \$36,031, respectively. Although Huerta testified that his girlfriend received income from S&F, her tax returns showed that her entire gross income for those years was attributable to her employment with two different companies unrelated to S&F.

The district court declined to order modification based on Mazzitello's cohabitation. It found it "highly probable" that Mazzitello would continue to cohabit. The district court placed the greatest emphasis on its determination that the economic impact on her would be detrimental if the cohabitation were to end because she would be forced to pay for expenses currently covered by her boyfriend.

The district court also would not modify based on substantial changes in the parties' incomes. It noted that Mazzitello's income had increased as a result of her gaining employment, but it pointed to her education expenses as an indication that she had not yet become self-supporting and still needed maintenance. The district court questioned Huerta's assertion that his income had decreased substantially. It emphasized that Huerta's income had fluctuated from year to year and that he was employed by a company owned by his girlfriend and bearing both their names. Based on this reasoning, the district court concluded that Huerta had not been "fully forthcoming" about his income and believed that he may have decreased his income in an attempt to modify his maintenance obligation. The district court found that S&F was essentially a shared business entity and believed that it would be "inequitable" not to consider Huerta and his girlfriend's combined income. The

district court calculated their combined monthly income as \$6,223.75, which it determined was close to the \$7,000 imputed to Huerta in the divorce decree. The district court therefore held that reduction of the maintenance obligation was not warranted based on any ground.

Huerta appeals.

DECISION

Huerta challenges the district court's denial of his motion to modify spousal maintenance. A district court's order regarding modification of maintenance is reviewed for an abuse of discretion. *Hemmingsen v. Hemmingsen*, 767 N.W.2d 711, 716 (Minn. App. 2009), *review granted* (Minn. Sept. 29, 2009) *and appeal dismissed* (Minn. Feb. 1, 2010). A district court abuses its discretion when it makes unsupported factual findings, misapplies the law, or acts in a manner contrary to logic and the facts in the record. *Madden v. Madden*, 923 N.W.2d 688, 696 (Minn. App. 2019). We review factual findings for clear error. *Id.*

The party moving to modify a maintenance award has the burden of showing a substantial change of circumstances rendering the existing terms unreasonable and unfair. Minn. Stat. § 518A.39, subd. 2(a) (2018); *see also Youker v. Youker*, 661 N.W.2d 266, 269 (Minn. App. 2003), *review denied* (Minn. Aug. 5, 2003). We address the district court's response to Huerta's alleged bases for modification: Mazzitello's cohabitation and changes in the parties' incomes.

I

Huerta challenges the district court's refusal to modify his maintenance obligation based on Mazzitello's alleged cohabitation. The district court may modify and even

terminate spousal maintenance “based on the cohabitation by the maintenance obligee with another adult following dissolution of the marriage.” Minn. Stat. § 518.552, subd. 6(a) (2018). The cohabitation statute directs the district court to consider four factors in determining whether cohabitation warrants modifying spousal maintenance: (1) whether the obligee would marry the cohabitant if not for the maintenance award; (2) the economic benefit that the obligee gains from the cohabitation; (3) the length and likely future duration of the cohabitation; and (4) the economic impact on the obligee if maintenance were modified and the cohabitation were to end. *Id.*

The district court considered these factors in deciding Huerta’s motion. It found that Mazzitello had lived with another man for over three years and would likely continue doing so. It also found that Mazzitello received some economic benefit from the cohabitation. These findings tended to support Huerta’s motion. But the district court refused to modify based on Mazzitello’s cohabitation, crediting Mazzitello’s testimony implying that she would not marry the man regardless of their cohabitation. And it weighed most heavily its finding on the final factor, which is the economic impact on Mazzitello “if maintenance is modified and the cohabitation ends.” It concluded that the impact on her would be severe.

Huerta argues that reversal is necessary because Mazzitello’s financial arrangement with her cohabitant leaves her with a surplus of income over expenses. But the district court was unpersuaded by this because the surplus results only so long as Mazzitello’s cohabitant continues covering certain expenses for Mazzitello. The district court recognized that, as Huerta emphasizes, Mazzitello’s expenses are now met in the arrangement. He argues unconvincingly that “[t]his is exactly the situation that le[d] to the amendment of the

maintenance statute to provide for an explicit provision for modifying maintenance obligations as the result of cohabitation.” Huerta is correct that the legislature considered “exactly [this] situation,” because the statute’s second factor is “the economic benefit the obligee derives from the cohabitation.” *Id.*, subd. 6(a)(2). But his implication that the district court *must* modify a spousal-maintenance award whenever this factor is met is belied by the legislature’s decision to make this only one of four factors, to direct the district court merely to “consider” the factor without suggesting that the factor must be afforded more weight than the others, and to include the merely permissive, discretionary introduction in the statute rather than mandatory language obligating the court to modify the obligation. *Id.*, subd. 6(a) (“Spousal maintenance *may* be modified . . . based on cohabitation” (emphasis added)).

We appreciate the logic driving Huerta’s contention that finding a significant economic benefit derived from an obligee’s cohabitation favors terminating or at least reducing spousal maintenance. We also acknowledge his accurate observation that maintenance would have ended automatically had Mazzitello instead chosen remarriage over cohabitation. *See* Minn. Stat. § 518A.39, subd. 3 (2018). But we presume that the legislature was also aware of these fairness concerns but nevertheless decided to design the statute so as to give wide discretion in the district court as to both how to weigh the factors and whether to modify maintenance because of them. On matters of statutory law, we must apply the language as the legislature provided it. *See* Minn. Stat. § 645.08(1) (2018). And on matters of discretionary weighing of a range of factors that “the court shall consider,” we will not substitute our judgment for the district court’s.

Huerta also argues that the district court misapplied the law by relying on Mazzitello's testimony that she did not intend to marry her cohabitant. The district court considered her testimony as bearing on the factor of whether the recipient would marry the cohabitant but for the maintenance award. *See* Minn. Stat. § 518.522, subd. 6(a)(1). Huerta implies that the finding on this factor should favor his motion to modify because the finding suggests that Mazzitello is simply substituting cohabitation for a maintenance-terminating remarriage. But the statute's wording indicates that the focus is not on whether the cohabitation resembles a marriage but on whether the obligee's purpose in choosing cohabitation over marriage is influenced by the effect that remarrying would have on the spousal-maintenance obligation. The district court credited Mazzitello's testimony that her reason for not wanting to marry the man is that she does not wish to go through the experience of marriage again. The district court therefore concluded that Mazzitello's cohabitation choice resulted from something other than an effort to maintain the obligation. The district court did not misapply the law by weighing this factor against Huerta's motion.

Because the district court "considered" the statutory factors, we discern no abuse of discretion in its cohabitation decision, and we affirm in part.

II

Huerta also argues that the district court erred by concluding that changes in the parties' incomes did not warrant modification. A district court may modify spousal maintenance upon a showing that a party's gross income has substantially increased or decreased. Minn. Stat. § 518A.39, subd. 2(a)(1). A district court's determination of income

is a factual finding we will leave intact unless it is clearly erroneous. *Peterka v. Peterka*, 675 N.W.2d 353, 357 (Minn. App. 2004).

Huerta contends that the district court erred by imputing to him the combined income of him and his cohabitant. The district court should not include an obligor's spouse's income as the obligor's income in determining spousal maintenance. See Minn. Stat. § 518A.29(f) (2018); *see also Lee v. Lee*, 775 N.W.2d 631, 635 n.5 (Minn. 2009) (holding that the definition of gross income in section 518A.29 applies to both child support and spousal maintenance). Although the statute specifically excludes a spouse's income rather than a cohabitant's, the statute nowhere suggests that the district court may include any other person's income when determining an obligor's income. See Minn. Stat. § 518A.29(a) (listing sources of gross income). We are satisfied that the district court should not count an obligor's cohabitant's income as the obligor's income.

But in deciding maintenance, the district court must consider the obligor's ability to meet the obligee's *and* obligor's needs. Minn. Stat. § 518.552, subd. 2(g) (2018). And the district court "may consider an obligor's earning capacity in determining [his] ability to comply with an order for . . . spousal maintenance." *Melius v. Melius*, 765 N.W.2d 411, 414 (Minn. App. 2009). When an obligor's representations about his income are not credible and the facts instead indicate that he is receiving unreported income through his spouse's business, the district court may determine his income based on an amount imputed to him from that business. *Cf. Eisenschenk v. Eisenschenk*, 668 N.W.2d 235, 241–42 (Minn. App. 2003), *review denied* (Minn. Nov. 25, 2003) (affirming district court's decision attributing income to child-support obligor from her new husband's business after

district court rejected as not credible her assertion that she lacked any income and performed no work for her husband's business). The district court here seemed to attempt a similar approach, attributing to Huerta income from his cohabitant's business. But the district court's approach here is unsupported.

Unlike in *Eisenschenk*, the district court's imputation of income here is not supported by the record. The district court rejected Huerta's claim to having a reduced income from 2016 to 2017 based on the following circumstances and reasoning. It observed that S&F Communications, the company that Huerta worked for earning \$15 an hour as a laborer, was owned by Huerta's cohabitant. It found that Huerta's reported income had dropped considerably from 2016 to 2017 (falling from about \$43,000 to about \$20,000) while his cohabitant's income changed only slightly (rising from about \$36,000 to about \$40,000). And it stated that Huerta "did not provide [the] Court with any testimony regarding the reduction in his annual income." Without referring to any financial record, organizational documentation, or testimony, the district court then characterized S&F Communications as "their own company," implicitly finding that Huerta has an ownership interest in the company. Based on this analysis, it found that "it appears" that Huerta "may have" intentionally earned less income specifically "in an attempt to obtain a modification of his maintenance obligations."

The district court's reasoning is unpersuasive and its findings lack evidentiary support. That the cohabitant's business bears a name derived from both her first initial and Huerta's is not evidence by itself establishing that Huerta has an ownership interest, that his interest (if any) generates any income at all, or that his work for the company generates

an income similar to her work for the company. We see nothing in the record available to the district court at the time of its decision indicating that Huerta's income from the business arose from anything other than his hourly employment there. The district court's correlation between Huerta's income and his cohabitant's income also fails to recognize that the cohabitant reported that her 2015 and 2016 income derived from employment with two other companies, *not* from her ownership of or her work for S&F. The district court essentially attributed to Huerta income entirely unrelated to S&F. If the record supports this rationale, the connection is neither evident in the district court's explanation nor obvious upon our review. We also observe that the district court erred by finding that the cohabitant's income was "\$40,485 in tax year 2017." This was her adjusted gross income for 2015 (before S&F even existed), and to the extent the district court believed the lack of a significant change in her income between 2016 and 2017 was relevant to Huerta's purported deception, the reasoning rests on this erroneous premise.

Although we reject the district court's reasoning, we cannot say based on our review of the record and the district court's explanation whether attributing some income to Huerta is supportable. We remand the case to allow the district court to enter a finding determining Huerta's income for the purposes of deciding the motion to modify. In doing so, it should specify the amount of income, if any, that should be imputed to Huerta and then determine whether modification is warranted based on the parties' respective incomes. The district court may, in its discretion, reopen the record to complete its findings and analysis.

Affirmed in part, reversed in part, and remanded.