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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-2152**

In re the Marriage of:
Robert William Bessenbacher, petitioner,
Appellant,

vs.

Olga Sergeyevna Bessenbacher,
Respondent,

County of Itasca, intervenor,
Respondent.

**Filed August 5, 2019
Affirmed in part and reversed in part
Ross, Judge**

Itasca County District Court
File No. 31-FA-14-2754

Robert William Bessenbacher, Grand Rapids, Minnesota (pro se appellant)

Rachel L. F. Weis, Legal Aid Service of Northeastern Minnesota, Grand Rapids, Minnesota
(for respondent Olga Bessenbacher)

Matti R. Adam, Itasca County Attorney, Jennifer Erin Ryan, Assistant County Attorney,
Grand Rapids, Minnesota (for respondent Itasca County)

Considered and decided by Larkin, Presiding Judge; Ross, Judge; and Bratvold,
Judge.

UNPUBLISHED OPINION

ROSS, Judge

Robert Bessenbacher and Olga Bessenbacher are the divorced parents of seven children. Robert appeals from the district court's order denying his motions to modify custody, child support, spousal maintenance, and the extant parenting-time arrangement, and restricting him from filing motions based on a finding that he is a frivolous litigant. We affirm all but the district court's restriction on filing motions, reversing in part because Olga's frivolous-litigant motion did not comply with procedural requirements.

FACTS

The district court issued a judgment and decree after a trial in 2015, dissolving Robert Bessenbacher and Olga Bessenbacher's marriage and ordering Robert to pay spousal maintenance and child support. The decree incorporated the parties' stipulated custody designations and parenting-time schedule for their seven children. This appeal arises from the district court's decisions addressing various motions by Robert and Olga: to modify child support; to modify spousal maintenance; to amend the parenting-time allocation; to change the location of parenting exchanges; and to declare Robert a frivolous litigant. The district court considered the custody and parenting-time motions based in part on an evidentiary hearing but all other motions on the pleadings.

The district court issued an order reaffirming Olga's status as sole legal custodian and granting her sole physical custody of the six minor children. It modified the parenting-time schedule to increase Robert's parenting time, and it left unchanged the parental-exchange location. It denied Robert's motion to modify child support and spousal

maintenance, and it declared him to be a frivolous litigant and restricted his right to file additional support- or maintenance-modification motions. Robert unsuccessfully moved the district court to amend its findings, to order a new trial, and, later, to hold Olga in contempt of court for interfering with his parenting time.

Robert appeals.

D E C I S I O N

Robert challenges every facet of the district court's decisions unfavorable to him. His challenge to only one of those decisions—the order restraining his right to file motions as a frivolous litigant—warrants reversal.

Custody

We identify no ground to reverse the district court's custody decision. We review a district court's child-custody decision for an abuse of discretion. *Pikula v. Pikula*, 374 N.W.2d 705, 710 (Minn. 1985). The district court abuses its discretion when it makes findings unsupported by evidence or improperly applies the law. *Id.* Robert argues that the district court abused its discretion by making unsupported factual findings. We will set aside a district court's findings of fact only if they are clearly erroneous. Minn. R. Civ. P. 52.01; *see also Goldman v. Greenwood*, 748 N.W.2d 279, 284 (Minn. 2008). In other words, when the disputed evidence could support a finding either for or against a factual conclusion depending on which evidence the district court weighs heavily and which it does not, we will leave the district court's finding intact. We are simply in no position on appeal to reweigh the evidence or reconsider credibility determinations so as to substitute our view of the evidence for the district court's. And our review of the record in light of

Robert's argument leaves us satisfied that the district court's findings are adequately supported.

Robert specifically questions the district court's finding that he abused Olga during the marriage, raising several theories that all essentially invite us to reweigh the quality of the competing evidence. That finding supplied some of the basis for the district court's custody-modification decision. The district court weighed the credibility of live testimony, considered police reports, and reviewed other evidence that, considered in the light most favorable to its finding, supplies the support for its understanding that Robert engaged in physically and psychologically abusive conduct during the marriage. We need not recount the evidence or specific conduct here. We say only that conflicted but sufficiently strong evidence supports the finding of abuse.

Robert challenges the district court's findings that homeschooling by Olga is in the best interests of the children and that her role as their teacher favored granting her sole legal and physical custody. These findings too have adequate evidentiary support. The district court heard the competing evidence and found that the parties cannot cooperate in educational decisions, that the children are doing well academically, and that conflict over their education is likely to continue unless one parent has the custodial authority to make the decisions. The district court's findings are supported and its decision falls within its discretion.

We also believe that the district court acted within its discretion by maintaining the parenting exchanges at the Wellstone Family Safety Center after considering the best interests of the children. The district court knew that other exchange locations and methods

employed by the parties had been unsuccessful at avoiding conflict. This demonstrates that the district court exercised its discretion reasonably, and we will not disturb the decision.

Parenting Time

Robert also does not identify a compelling reason for us to reverse the district court's parenting-time decision. We review a district court's decision to modify parenting time for an abuse of discretion. *Shearer v. Shearer*, 891 N.W.2d 72, 75 (Minn. App. 2017). The district court seemed to carefully weigh Robert's strong contention that the parties' parenting time with the children should be divided evenly. But it considered, among other things, that homeschooling by Olga is in the best interests of the children and that an equal division would interfere with their education. The operative statute framing the district court's decision does not obligate the court to presume an equal division. See Minn. Stat. § 518.175, subd. 1(g) (2018) (presuming each parent is entitled to 25% of parenting time). We understand that a different decision-maker might have come to a different result, but this is not because the result here is arbitrary; it is because the district court has broad discretion and reasonable minds might differ about the best outcome.

Child Support and Spousal Maintenance

Robert argues that the district court erred by denying his motion to modify child support and spousal maintenance. District courts have broad discretion to modify both child support and spousal maintenance, and we will overturn the district court's decision only if it abuses that discretion. *Claybaugh v. Claybaugh*, 312 N.W.2d 447, 449 (Minn. 1981); *Shearer*, 891 N.W.2d at 77. Robert argues that the district court erred by finding that his circumstances had not changed sufficiently to warrant a modification. For Robert to be

entitled to modification of support or maintenance, he must show that there has been a substantial change in circumstances that makes the extant award unreasonable or unfair. Minn. Stat. § 518A.39, subd. 2 (2018).

Robert offers different theories to support his contention that the district court improperly rejected some of his claimed expenses as unsupported by evidence. None of his arguments succeed. Robert argues that the district court erred by failing to adjust his expenses to account for the parties' oldest child living with him. But because that child has lived with Robert since the original child-support determination, *Bessenbacher v. Bessenbacher*, A17-0339, 2017 WL 3585124, at *4 (Minn. App. Aug. 21, 2017), the residence of that child is not a change in circumstance. The district court also found that Robert had not substantiated his child-related expenses, and Robert points to no evidence that undermines that finding.

Robert maintains that the district court should have included his saving toward retirement as a necessary expense because it was an expense during the marriage. Assuming the argument has merit and that the court erred by treating the expense otherwise, Robert does not convince us to reverse. He fails to identify compelling evidence demonstrating that any difference between the amount of reasonable retirement savings during the marriage and reasonable retirement savings now would constitute a substantial change in circumstances. His contention that his attorney fees are necessary also fails on various grounds, including his failure to provide evidence that these expenses would continue when he is no longer engaged in this litigation. The district court dismissed as

unsupported by evidence Robert's other claimed expenses. Robert fails to demonstrate that the court's treatment of those expenses reflects clear error.

Robert contends that the district court should have deviated from the typical approach of basing ability to pay maintenance on gross income and instead measured his ability to pay based on his net income because of his tax withholdings and credit-card debt, citing *Kostelnik v. Kostelnik*, 367 N.W.2d 665, 670 (Minn. App. 1985), *review denied* (Minn. July 26, 1985). It is true that the *Kostelnik* court held that the district court should have determined spousal maintenance using the obligor's take-home pay instead of his gross income. *Id.* But that was because his business expenses significantly diminished the value of his take-home pay. *Id.* Robert failed to introduce evidence or convincing argument aligning his situation with *Kostelnik*'s as it regards business expenses. And the district court was not persuaded that Robert's credit-card debt resulted from reasonable or necessary expenses. It also found credible Olga's testimony that Robert had manipulated his payroll withholdings to minimize his periodic take-home pay. The district court did not misapply the law by calculating Robert's ability to pay based on his gross income.

Frivolous Litigant

Robert argues that the district court erred as a matter of law by restricting his right to file motions based on its conclusion that he is a frivolous litigant. A district court may restrict a party's right to file motions on a conclusion that he is a frivolous litigant. Minn. R. Gen. Prac. 9.01–.07. We will overturn a district court's conclusion that a party is a frivolous litigant if the district court abused its discretion. *See Szarzynski v. Szarzynski*, 732 N.W.2d 285, 295 (Minn. App. 2007). An abuse of discretion occurs if the district court

fails to abide by the procedural requirements controlling frivolous-litigant motions set out in the Minnesota General Rules of Practice. *See id.*; *see also Phelps v. State*, 823 N.W.2d 891, 894 (Minn. App. 2012) (“Minn. R. Gen. Pract. 9.01–.07 contain[] procedural requirements with which the parties and district court must comply.”). The record supports Robert’s assertion that Olga presented her frivolous-litigant motion outside the rules.

A party moving the district court to declare her opponent a frivolous litigant cannot file or present her motion to the court “unless, within 21 days after service of the motion . . . , the challenged claim, motion, or request is not withdrawn or appropriately corrected.” Minn. R. Gen. Prac. 9.01. Olga served her frivolous-litigant motion on Robert on January 29, 2018, and she waited only 14 days after service to file it on February 12. Because Olga failed to honor the pre-filing waiting period required by the rule, the district court abused its discretion by granting her motion.

Olga contends that the rule violation was cured by her presenting the motion to the district court during the evidentiary hearing, which was more than 21 days after she served it. Olga’s contention cannot prevent reversal. The rule states that a frivolous-litigant motion “shall not be *filed with or presented to* the court” until the 21-day cure period has passed. Minn. R. Gen. Prac. 9.01. We reverse the district court’s frivolous-litigant conclusion and the consequent filing restriction.

Contempt

Robert argues that the district court erred by not holding Olga in contempt of court, and here again we review for an abuse of discretion. *In re Welfare of J.B.*, 782 N.W.2d 535, 538 (Minn. 2010). Robert maintains specifically that the record proves that Olga was

interfering with his parenting time by persuading the children to refuse to visit him. The district court may hold a party in contempt for purposefully disobeying its order. *Erickson v. Erickson*, 385 N.W.2d 301, 304 (Minn. 1986). The district court received evidence that, according to the child who was allegedly refusing to visit Robert during the relevant period, Olga had encouraged—not discouraged—the child to participate in parenting time with Robert. This evidence, notwithstanding any conflicting evidence, supports the district court’s finding that Olga did not contemptuously disobey the court’s allegedly violated, August 2018 parenting-time order.

Amended Findings and New Trial

Robert argues that the district court erroneously denied his motion for amended findings or a new trial after it denied his motion to modify. A district court may amend its findings or make additional findings upon a timely request by a party. Minn. R. Civ. P. 52.02. We review a denial of a motion requesting additional findings for an abuse of discretion. *Zander v. Zander*, 720 N.W.2d 360, 364 (Minn. App. 2006), *review denied* (Minn. Nov. 14, 2006). We have carefully considered Robert’s argument in light of the record, and we see no merit to it. Robert argues that the district court made factual findings inconsistent with the record, but he points to no finding that is unsupported by evidence in the record. And “special proceedings” like motions to modify custody, maintenance, and child support are not the proper subject of a new-trial motion. *See Angelos v. Angelos*, 367 N.W.2d 518, 520 (Minn. 1985); *Huso v. Huso*, 465 N.W.2d 719, 720–21 (Minn. App. 1991). We therefore affirm.

Affirmed in part and reversed in part.