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STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0482

In re the Marriage of:

John Edward Warrington,
Respondent,

and

Karen Lee Warrington,
Appellant.

Filed March 30, 2020
Reversed and remanded
Bryan, Judge

Hennepin County District Court
File No. 27-FA-16-3836

Anne M. Honsa, Deborah M. Gallenberg, Honsa Rodd Landry, Minneapolis, Minnesota (for respondent)

Matthew J. Gilbert, Gilbert Alden PLLC, Burnsville, Minnesota (for appellant)

Considered and decided by Reyes, Presiding Judge; Bratvold, Judge; and Bryan, Judge.

U N P U B L I S H E D   O P I N I O N

BRYAN, Judge

Appellant challenges the denial of her motions to modify child support and spousal maintenance. Because the district court did not address the applicability of statutory presumptions, we remand for further proceedings. On remand, the district court may reopen the record at its discretion regarding the motions to modify child support and spousal maintenance. In addition, appellant also challenges the district court's award of conduct-based attorney fees. Because the district court abused its discretion in concluding that appellant unreasonably contributed to the length or expense of the proceeding, we reverse the award of conduct-based attorney fees.

FACTS

Appellant Karen Lee Warrington (wife) and respondent John Edward Warrington (husband) married in September 2002. The parties have one minor child together born in 2003. In May 2016, husband filed his petition for the dissolution of marriage. The district court held a two-day court trial on February 21 and 22, 2017. The district court entered its dissolution decree on July 6, 2017 (the judgment and decree).

In the judgment and decree, the district court found that husband was employed as a pilot at FedEx with a gross monthly income of $28,729 and a reasonable monthly budget of $9,590. Calculating wife's income required more nuanced findings. The district court determined that wife was self-employed as a commodities broker, operated as a sole proprietor, filed a 1099 and a schedule C with the IRS, and had been affiliated exclusively with McVean Trading & Investments, LLC (McVean) since 1994. In the judgment and decree, the district court acknowledged that, at the time of her testimony in February 2017, wife was contemplating a change in her career. The district court noted that, according to wife, she had the following three employment options: (1) remain self-employed and remain with McVean, which would result in continued loss of clients and decreasing income; (2) remain self-employed, but move away from McVean, which could allow her to retain her existing clients and grow assets under management with new clients; or (3) become employed at a brokerage firm as a W-2 employee, which would result in anticipated income of approximately $75,000 per year. In addition, the district court found that wife claimed a large amount of deductions due to business expenses that reduced her taxable income by $68,698.

For the purposes of establishing ongoing child support and spousal maintenance, the district court found wife's income to be $167,476, declining to reduce her income by the claimed tax deductions (taxable income of $98,778 plus claimed deductions of $68,698 = $167,476). In determining the duration of ongoing spousal maintenance, the district court observed that wife anticipated her income would decrease before ultimately increasing to approximately $200,000 within three years (from the date of her testimony in February 2017).[1] The district court awarded wife temporary (rehabilitative) spousal maintenance until June 2020, ordering husband to pay her the amount of $7,750 per month until the sale of the home and the amount of $2,250 per month upon the sale of the home through June 2020. The district court also awarded wife ongoing child support, ordering husband to pay $1,027 per month.[2]

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[1] This estimate was made by wife assuming that she followed the second of the three separate employment scenarios: remain self-employed, but move away from McVean, retaining her existing clients and growing assets under management with new clients.

[2] On August 4, 2017, wife filed a notice of motion and motion for amended findings of fact and conclusions of law asserting that husband's acceptance of a new position would boost his income and affect parenting time. The district court denied wife's motion because it had already considered the evidence, testimony, submissions, and expert reports in its analysis and decision regarding spousal maintenance.

On June 12, 2018, wife moved to modify both spousal maintenance and child support.[3] Wife based her motion on two primary grounds: (1) husband's income had increased substantially since the judgment and decree; and (2) wife's income had decreased substantially since the judgment and decree. In her affidavit in support of the motion, wife stated that husband accepted a new position at FedEx and his income increased, but she did not know the extent of the change. Wife also noted that, since the decree, husband relocated out of the state to Memphis, Tennessee, where there is no state income tax and the cost of living is much lower. Wife further based her motion on the assertion that husband had not exercised parenting time since August 2017, and that husband had not contributed to the child's extracurricular activities. As it related to her financial circumstances, wife stated that her income decreased from $167,484 to $89,568 (a decrease of 46.5%).

Wife supplied the district court with a total of 29 exhibits to her affidavits.[4] Her June 12, 2018, affidavit included 18 exhibits. Many of these exhibits constitute evidence of wife's current income and financial circumstances. For example, Exhibit 2 shows wife's assets under management from June 2015 ($14,077,142) to June 2018 ($3,112,395). Exhibit 3 contains wife's gross commissions by month and total income earned. Exhibit 4

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[3] Wife specifically moved to change the amount of spousal maintenance and in her motion, she did not include an end date. Wife and the district court interpreted this as a request to modify the duration of the temporary spousal maintenance to make it permanent. *See Gales v. Gales*, 533 N.W.2d 416, 418 (Minn. 1996) (observing that "by failing to designate when the payments would end, the court in effect awarded permanent maintenance").

[4] Wife filed affidavits on June 12, July 13, July 17, and July 18, 2018, relating to her motions and in response to husband's pleadings. The district court denied husband's request to strike her supplemental affidavits.

consists of summary sheets that wife received from McVean, displaying the equity of each account that wife managed. Exhibit 18 contains paystubs from December 2016 to April 2018. On July 13, 2018, wife filed a responsive affidavit with two additional exhibits, one of which (exhibit B) contained wife's 1099 from 2015, her 1099 from 2017, and her 2017 federal and state tax returns. On July 17, 2018, wife filed an affidavit with six exhibits pertaining to husband's income. On July 18, 2018, wife filed a supplemental affidavit with three additional exhibits, including correspondence from McVean terminating wife's association with the company dated June 22, 2018, after she filed the motion and her initial affidavit.

In response, husband filed an affidavit noting that in 2018 he earned overtime income of $72,869.55.[5] This was in addition to his base salary of $344,746, as determined by the district court in the 2017 judgment and decree. Although wife's initial affidavit did not include a specific dollar amount to quantify her assertion that husband's income had increased, husband provided this information to the district court in response to wife's modification motion. Husband also filed a motion for conduct-based attorney fees for having to address and respond to wife's motions.

[5] Husband's "overtime" income increased since starting his position as a Line Check Airman in April 2017. The district court found that, as is customary in the airline industry, "overtime" for husband's employment consists of hours that exceed 77 flight hours per four weeks. The district court rejected husband's contention that his "overtime" pay is not income for determining maintenance. Instead the district court concluded the additional amount was income because even with the hours in excess of 77 flight hours, husband still worked less than 40 hours per week.

The district court issued an order denying wife's motions to modify spousal maintenance and child support. In doing so, the district court found that wife did not provide any tax documents or any other documents to corroborate her claim of decreased income. The district court also found that husband's income increased by $72,870. The district court's order focused only on spousal maintenance and did not separately analyze the motion to modify child support. The order was silent on whether the increase in husband's income alone constituted a change in circumstances under the modification statute. The district court also granted husband's request for conduct-based attorney fees, awarding husband $13,355.75.

D E C I S I O N

I. Denial of Motions to Modify Child Support and Spousal Maintenance

We review a district court's decisions regarding whether to modify spousal maintenance, to modify child support, the proper amount of each, and the duration of spousal maintenance for an abuse of discretion. *E.g.*, *Haefele v. Haefele*, 837 N.W.2d 703, 708 (Minn. 2013) (child support); *Hecker v. Hecker*, 568 N.W.2d 705, 709-10 (Minn. 1997) (spousal maintenance). We apply a clearly erroneous standard of review to a district court's findings of fact concerning spousal maintenance and child support. *E.g.*, *Putz v. Putz*, 645 N.W.2d 343, 347 (Minn. 2002) (child support); *Gessner v. Gessner*, 487 N.W.2d 921, 923 (Minn. App. 1992) (spousal maintenance). We apply a de novo standard of review to questions of law related to spousal maintenance and child support. *E.g.*, *Haefele*, 837 N.W.2d at 708 (child support); *Melius v. Melius*, 765 N.W.2d 411, 414 (Minn. App. 2009) (spousal maintenance).

A. Statutory Presumptions

Wife argues that the district court failed to analyze the motions to modify spousal maintenance and child support under Minnesota Statutes, section 518A.39 (2018). Because the district court did not determine whether the statutory presumptions set forth in section 518A.39 apply in this case, we reverse the denial of wife's modification motions and remand to the district court for further proceedings.

The party requesting modification to child support or spousal maintenance must show that a substantial change in circumstances has occurred. Minn. Stat. § 518A.39, subd. 2(a). To determine whether changes in circumstances are "substantial," the statute provides specific, quantifiable thresholds. For spousal maintenance modification motions, district courts consider decreases in the parties' incomes. Specifically, district courts determine whether the moving party has demonstrated that "the gross income of an obligor or oblige has decreased by at least 20 percent through no fault or choice of the party." Minn. Stat. § 518A.39, subd. 2(b)(5). For child support modification motions, district courts consider changes to the variables used to calculate child support. Specifically, district courts determine whether the moving party has shown that the current financial circumstances of the parties would result in a child support order "that is at least 20 percent and at least $75 per month higher or lower than the current support order . . . ." Minn. Stat. § 518A.39, subd. 2(b)(1).

When the moving party establishes the statutory threshold, district courts must apply two separate presumptions to the modification request. Minn. Stat. § 518A.39, subd. 2(b); *Rose v. Rose*, 765 N.W.2d 142, 145 (Minn. App. 2009); *Frank-Brewtisch v. Ryan*, 741

N.W.2d 910, 914 (Minn. App. 2007). First, establishing the threshold creates an irrebuttable presumption that a substantial change has occurred. Minn. Stat. § 518A.39, subd. 2(b); *Rose*, 765 N.W.2d at 145. Second, establishing the threshold also creates a separate, rebuttable presumption that the current order is unreasonable and unfair. Minn. Stat. § 518A.39, subd. 2(b); *Rose*, 765 N.W.2d at 145; *O'Donnell v. O'Donnell*, 678 N.W.2d 471, 477 (Minn. App. 2004).

In this case, for purposes of wife's spousal maintenance modification motion, the district court should consider decreases to wife's income. Wife could obtain the benefit of the two statutory presumptions on her spousal maintenance modification motion if she can demonstrate that her income dramatically decreased. For purposes of wife's separate child support modification motion, the district court should consider increases to husband's income, decreases to wife's income, and any other changes to the variables that effect the child support guidelines calculation. Wife could obtain the benefit of the two statutory presumptions on her child support modification motion if she can demonstrate that increases to husband's income, decreases to her income, or both would result in a new child support order that is at least 20 percent and at least $75 per month higher or lower than the current support order.

B. Spousal Maintenance Modification[6]

A decrease in wife's income of at least 20% through no fault or choice of hers would require the district court to apply the two statutory presumptions to wife's spousal maintenance modification motion. Minn. Stat. § 518A.39, subd. 2(b)(5). Wife argues that the district court abused its discretion in not determining her current income and clearly erred in finding that she did not provide tax documents or other income evidence. We conclude that a mistake has been made, and that this record does not support the district court's finding regarding wife's submissions.

Deciding whether to apply the statutory presumptions to a spousal maintenance modification motion requires a comparison between the current circumstances and the circumstances at the time of the previous order. *See Bormann v. Bormann*, 644 N.W.2d 478, 482 (Minn. App. 2002) (remanding denial of modification motion due to inadequate factual findings and observing that ruling on such motions "generally involves (but is not necessarily limited to) a comparison of the obligor's existing obligation with what the obligation would be if it were modified"). In this case, the modification statute requires the district court to consider wife's current income and financial circumstances. Once it has determined wife's current income, the statute requires the district court to compare the current income to the income findings in the 2017 judgment and decree. It is not enough to conclude that wife's income decreased, as anticipated in the 2017 judgment and decree.

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[6] We address the district court's denial of wife's spousal maintenance modification motion as an independent and separate appellate issue from the denial of her child support modification motion.

The degree of decrease in income might exceed what had been anticipated at the time of wife's initial testimony prior to the issuance of the 2017 judgment and decree. Alternatively, the decrease may have resulted from some reason other than what was contemplated prior to the issuance of the 2017 judgment and decree.[7]

The district court did not conduct this comparison. Instead, the district court denied wife's modification motions because it found that she "ha[d] not provided the Court with any tax documents or any other documents to corroborate her claim that her income has drastically decreased." Wife asserts the district court erred because this finding is contrary to the record. We agree. Wife supplied the district court with a total of 29 exhibits to her affidavits. Exhibits 2, 3, 4, and 18 of wife's June 12, 2018, affidavit all relate to calculation of her current income. Exhibit 2 shows wife's assets under management from June 2015 ($14,077,142) to June 2018 ($3,112,395). Exhibit 3 lists wife's gross commissions by month and total income earned. Exhibit 4 includes summary sheets that wife received from McVean displaying the equity of each account that wife managed. Exhibit 18 consists of wife's paystubs from December 2016 to April 2018. In addition, exhibit B of wife's July 13, 2018, responsive affidavit was wife's 2017 federal and state income tax returns. We conclude that the district court clearly erred when it found that wife did not submit documentation of her current income. We reverse the denial of wife's spousal maintenance

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[7] For example, in the 2017 judgment and decree, the district court anticipated a decrease in income, followed by an increase in income, if wife followed the second employment scenario identified by wife. This scenario, however, assumed wife would keep the majority of her old clients. If this assumption did not actually come to pass, the district court could consider this in deciding whether the current order was unreasonable and unfair.

modification motion and remand to the district court to determine the change in wife's income and to determine whether the change satisfies the thresholds set forth in section 518A.39, subdivision 2(b)(5). If the statutory threshold is established, then the district shall apply the presumptions when deciding whether to grant or deny wife's spousal maintenance modification motion.

C. Child Support Modification

Deciding whether to apply the statutory presumptions to child support modification motions also requires a comparison. The modification statute requires the district court to consider whether a "calculated court order" is "at least 20 percent and at least $75 per month higher or lower than the current support order." Minn. Stat. § 518A.39, subd. 2(b)(1). Wife argues that the district court failed to apply the law when it denied wife's child support modification motion without calculating a new support order (given the changes to her income and to husband's income)[8] and without comparing the new support order to the current order. We agree.

The district court found that husband's income increased by $72,870 to a total annual income of $417,616. This is an increase of 21%. Even without considering the asserted decrease in wife's income, the district court's findings of husband's new income alone could result in a new child support calculation that triggers the statutory presumptions. Because the district court did not make a new calculation of child support and because the district court did not compare the new calculation to the current order, the

[8] The parties' parenting time may also have changed, which could also affect the new calculation of child support.

district court did not determine whether the statutory presumptions apply. We reverse the denial of wife's child support modification motion and remand to the district court to determine whether the changes to both parties' incomes satisfy the threshold set forth in section 518A.39, subdivision 2(b)(1). If the statutory threshold is established, then the district court shall apply the presumptions when deciding whether to grant or deny wife's child support modification motion.

D. Remand

As noted above, the district court failed to make findings necessary to determine whether the statutory presumptions apply to this case. Findings are necessary "to facilitate meaningful appellate review, to show that the trial court considered all the relevant statutory factors, and to satisfy the parties that the trial court fairly resolved their case." *Lewis v. Lewis*, 414 N.W.2d 588, 590 (Minn. App. 1987). Reversal and remand for additional findings is appropriate when the district court fails to make adequate findings. *Tuthill v. Tuthill*, 399 N.W.2d 230, 232 (Minn. App. 1987).

On remand, the district court shall have the discretion to determine whether to reopen the record regarding the parties' income or to make additional findings without reopening the record. Under either approach, the district court should make all findings necessary to properly determine whether the statutory presumptions apply to wife's modification motions. Should the district court determine that wife has established the requisite threshold to trigger the statutory presumptions, the district court shall then shall make all factual findings necessary to determine whether husband has rebutted the presumption of unreasonableness and unfairness. If wife cannot establish the statutory thresholds, then the district court shall still determine whether the current order is unreasonable and unfair in the absence of the statutory presumptions and shall make all factual findings necessary to support that determination. Finally, if the district court modifies spousal maintenance or child support, the district court shall also make all necessary findings regarding whether to modify spousal maintenance or child support retroactively to either of the following: (1) the date on which wife first served notice of her motions to modify; or (2) to some other date since the date on which wife first served notice of her motions to modify. Minn. Stat. § 518A.39, subd. 2(f) (2018).

II. Award of Conduct-Based Attorney Fees

Conduct-based attorney fees are allowed at the discretion of the district courts if one party unreasonably contributes to the length or expense of the proceeding. Minn. Stat. § 518.14, subd.1 (2018). The party moving for conduct-based attorney fees "has the burden to show that the conduct of the other party unreasonably contributed to the length or expense of the proceeding." *Baertsch v. Baertsch*, 886 N.W.2d 235, 238 (Minn. App. 2016) (citing *Geske v. Marcolina*, 624 N.W.2d 813, 818 (Minn. App. 2001)). We review the district court's decision to award attorney fees for an abuse of discretion. *Sanvik v. Sanvik*, 850 N.W.2d 732, 737 (Minn. App. 2014). In this case, wife did not unreasonably litigate the modification motions. Husband's own affidavit indicates a large increase in his income, justifying wife's decision to request modification. In addition, in light of our decision regarding wife's income, wife had sufficient basis to request modification. Because the district court abused its discretion, we reverse the award.

Reversed and remanded.