STATE OF MINNESOTA
IN COURT OF APPEALS
A22-0077

In re the Marriage of:
Marlo Renee Nelson, petitioner,
Appellant,

vs.

Daniel Lawrence Nelson,
Respondent.

Filed December 27, 2022
Affirmed
Johnson, Judge

Dakota County District Court
File No. 19WS-FA-18-1276

Michael P. Boulette, Seungwon R. Chung, Laura E. Kvasnicka, Taft, Stettinius & Hollister, L.L.P., Minneapolis, Minnesota (for appellant)

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Considered and decided by Connolly, Presiding Judge; Johnson, Judge; and Jesson, Judge.

SYLLABUS

In calculating a parenting-expense adjustment as part of the determination of a child-support obligation, a district court shall use the court-ordered amounts of parenting time, not the amounts of parenting time actually being exercised.

OPINION

JOHNSON, Judge

The parties to this appeal stipulated to a dissolution decree that determined their respective amounts of parenting time and required the father to pay the mother $734 per month in basic child support. Approximately four months after entry of the decree, the father ceased exercising his right to parenting time. The mother moved to modify the child-support order on the ground that the parties' actual amounts of parenting time constituted a substantial change in circumstances that made the existing child-support order unreasonable and unfair. The district court denied the motion. We conclude that the district court properly based its decision on the court-ordered amounts of parenting time—not the amounts of parenting time actually being exercised—when calculating the applicable parenting-expense adjustment and, thus, properly determined that there is no substantial change in circumstances. Therefore, we affirm.

FACTS

Marlo Renee Nelson and Daniel Lawrence Nelson were married in 1997. They have two joint children: a son born in September 2006 and a daughter born in February 2008.

In November 2018, Marlo petitioned for dissolution of the marriage. In December 2019, the parties stipulated to a dissolution judgment and decree that resolved all issues. The stipulated decree provides that, in every two-week period, the children shall reside overnight with Marlo for eight nights and with Daniel for six nights. This provision implies that Marlo and Daniel have 208 nights and 157 nights of parenting time per year, respectively. The stipulated decree also provides that Daniel must pay Marlo $734 per

month based on the parties' respective percentages of parenting time and the fact that Daniel's and Marlo's gross incomes were 57 percent and 43 percent, respectively, of the parties' total income for purposes of child support.

In February 2021, Marlo moved to modify the child-support order in various ways. In an accompanying affidavit, Marlo stated that the children had "not spent an overnight with Dan in approximately nine months." She argued that the district court, in deciding whether she had shown a substantial change in circumstances, should determine Daniel's child-support obligation without applying a parenting-expense adjustment because Daniel was not exercising any parenting time. In response, Daniel argued that the district court should refer to the court-ordered amounts of parenting time—not the actual amounts of parenting time—in determining whether to apply a parenting-expense adjustment.

In October 2021, the district court filed an order in which it granted Marlo's motion and ordered Daniel to pay $1,582 per month in basic child support. Daniel moved for amended findings of fact, conclusions of law, and order. He argued that the district court had erred by basing its decision on the parties' actual amounts of parenting time instead of the court-ordered amounts of parenting time.

In January 2022, the district court granted Daniel's motion and filed an amended order with numerous amended findings of fact and conclusions of law and—importantly—an amended order denying rather than granting Marlo's motion to modify child support. The district court agreed with Daniel that the court-ordered amounts of parenting time, not the actual amounts, must be used in the parenting-expense-adjustment calculation.

Marlo appeals. Her primary argument on appeal is that the district court erred by relying on the court-ordered amounts of parenting time, rather than the actual amounts of parenting time, when considering her motion to modify the child-support order. She makes a secondary argument that the district court erred in its interpretation of the statutory provisions concerning the prerequisites for a modification. At oral argument, Marlo's attorney agreed that she must prevail on both arguments in order to obtain appellate relief and that, if this court were to reject her primary argument, it would be unnecessary to consider her secondary argument. In light of our resolution of Marlo's primary argument, we need not consider her secondary argument.

ISSUE

On a motion to modify a child-support order, if the amounts of parenting time actually exercised are different from the court-ordered amounts of parenting time, must a district court use the court-ordered amounts or the actual amounts when calculating the parenting-expense adjustment?

ANALYSIS

Marlo argues that the district court erred by denying her motion to modify the amount of Daniel's monthly child-support payment.

A.

We begin by identifying the relevant statutory provisions.

To determine the existence and amount of a basic child-support obligation, a district court first must determine each parent's gross income and each parent's percentage share of total parental income for purposes of child support. Minn. Stat. § 518A.34(b)(1)-(3)

(2022). A district court then must refer to statutory guidelines to determine the presumptively appropriate amount of the parent's combined basic child-support obligation. Minn. Stat. § 518A.34(b)(4) (citing Minn. Stat. § 518A.35 (2022)). A district court next must "determine each parent's share of the combined basic support obligation by multiplying" the combined basic child-support obligation by the parent's percentage of total parental income for purposes of child support. Minn. Stat. § 518A.34(b)(5). Finally, if the parties share parenting time, a district court must calculate a parenting-expense adjustment. Minn. Stat. § 518A.34(b)(6) (citing Minn. Stat. § 518A.36 (2022)); *see also In re Dakota County*, 866 N.W.2d 905, 910 n.1 (Minn. 2015); *Haefele v. Haefele*, 837 N.W.2d 703, 708 (Minn. 2013).

The parenting-expense-adjustment formula presumes that each parent is responsible for the costs of caring for a child while the child is in that parent's care. Minn. Stat. § 518A.36, subd. 1(a). Accordingly, the formula requires consideration of "the percentage of parenting time granted to or presumed for each parent." *Id.* "For purposes of this section, the percentage of parenting time means the percentage of time a child is scheduled to spend with the parent during a calendar year *according to a court order* averaged over a two-year period." *Id.* (emphasis added). The formula calculates a parenting-expense adjustment by considering "the approximate number of annual overnights the child or children will likely spend with" each parent. *Id.*, subd. 2(b)(1)-(2).

A district court may modify an existing child-support order if the moving party makes a showing of any one of eight enumerated circumstances that make the existing child-support order unreasonable and unfair, such as "substantially increased or decreased

gross income of" either party, "substantially increased or decreased need of" either party, or "a change in the cost of living for either party." Minn. Stat. § 518A.39, subd. 2(a), 2(a)(1), (2), (4) (2022). A moving party is presumed to have made a sufficient showing of a substantial change in circumstances if any one of six enumerated conditions are present. *Id.*, subd. 2(b). The first of the six enumerated conditions is that the application of the child-support guidelines "to the current circumstances" would result in a child-support payment that is at least 20 percent more or less and at least $75 more or less than the amount of the existing child-support order. *Id.*, subd. 2(b)(1); *see also Palmquist v. Devens*, 907 N.W.2d 204, 206 (Minn. App. 2017); *Rose v. Rose*, 765 N.W.2d 142, 145 (Minn. App. 2009).

B.

In this case, Marlo's motion was based on the undisputed fact that the parties' actual amounts of exercised parenting time were different from the court-ordered amounts of parenting time. Also undisputed is the fact that, if the parties' actual amounts of parenting time were incorporated into the parenting-expense-adjustment formula, the result would be a child-support payment from Daniel to Marlo that is more than 20 percent higher and more than $75 higher than the existing child-support order. But the district court determined that Marlo did not show a substantial change in circumstances because, as a matter of law, the parenting-expense adjustment requires consideration of the court-ordered amounts of parenting time, not the actual amounts of parenting time.

The district court's decision is consistent with our caselaw. In *Hesse v. Hesse*, 778 N.W.2d 98 (Minn. App. 2009), the parents were awarded roughly equal amounts of

parenting time, but the father did not exercise two weeks of parenting time during a vacation period. *Id.* at 101. On a motion to modify the child-support order, the district court reasoned that the father's failure to exercise parenting time during that two-week period was irrelevant and, thus, used the court-ordered amounts of parenting time in the parenting-expense-adjustment formula. *Id.* On appeal, the mother argued that the district court erred by not accounting for the father's failure to exercise parenting time during the two-week vacation period. *Id.* at 102. This court affirmed, reasoning that "[t]he plain language of Minn. Stat. § 518A.36, subd. 1(a), provides that parenting time, for purposes of parenting-expense adjustment, is determined by the terms of a court order scheduling parenting time." *Id.* at 103. We explained that section 518A.36, subdivision 1(a), "dictates that father retains the full two weeks of vacation parenting time granted in the dissolution judgment when determining his parenting-expense adjustment for support calculation, even if he does not exercise that parenting time." *Id.* We commented that "[a]ny other result would encourage litigation by allowing a party to return to court to argue for a parenting-expense adjustment, and consequently a recalculation of support, based solely on that party's failure to exercise scheduled parenting time." *Id.* We commented further that "[a] party who wishes to challenge compliance with the parenting-time provisions of a court order should instead move for a hearing to resolve the parenting-time dispute." *Id.*

We reiterated *Hesse*'s holding in *Shearer v. Shearer*, 891 N.W.2d 72 (Minn. App. 2017), in which the parents agreed to equal amounts of parenting time, with the specific days to be determined by them according to the father's out-of-town work schedule, which varied on a monthly basis. *Id.* at 74. On a motion to modify the child-support order, the

district court found that the father actually had exercised only 41 percent of parenting time and used the parties' actual amounts of parenting time in the parenting-expense-adjustment formula. *Id.* at 75. On appeal, the father argued that the district court erred by using the parties' actual amounts of parenting time instead of the equal amounts that had been ordered by the court. *Id.* at 78. This court reversed, reasoning that *Hesse* applied and that "[p]arenting-time expense adjustment calculations must be based on the scheduled amount of parenting time." *Id.*

Marlo acknowledges our opinions in *Hesse* and *Shearer* but contends that the legislature has since changed the applicable law by amending the relevant statutes. In 2016, the legislature amended several statutes relating to child support, effective in 2018. *See* 2016 Minn. Laws ch. 189, art. 15, §§ 17-21, at 232-39 (amending various provisions in Minn. Stat. §§ 518A.26, .34, .35, .36, .39). The amendments to section 518A.36, the parenting-expense-adjustment statute, consist primarily of an overhaul of the formula for calculating the parenting-expense adjustment. *See* 2016 Minn. Laws ch. 189, art. 15, § 20, at 235-37. The prior version of the statute considered each parent's parenting time by placing it into one of three broad categories: less than 10 percent, between 10 and 45 percent, and between 45 and 50 percent. Minn. Stat. § 518A.36, subd. 2 (2014); *see also Shearer*, 891 N.W.2d at 77-78. Only the second category necessarily resulted in an adjustment, and the adjustment was fixed at only 12 percent. Minn. Stat. § 518A.36, subd. 2 (2014) A legislatively authorized work group found this approach to be problematic because "the three-tiered adjustment creates two large 'cliffs'" at which "a child support obligation could change hundreds of dollars per month based on the

difference of one overnight equivalent over an entire year." Minn. Dep't of Human Servs., *Child Support Work Group Final Report* 10 (Jan. 29, 2016).[1] The legislature's 2016 amendment deleted the three-category approach and replaced it with a formula that considers the precise amount of each parent's percentage of parenting time, thereby avoiding the problematic "cliffs" and making child support reflective of parenting time at every percentage interval. *See* 2016 Minn. Laws ch. 189, art. 15, § 20, at 235-36 (amending Minn. Stat. § 518A.36, subd. 2).

In arguing for a result that is contrary to *Hesse* and *Shearer*, Marlo relies on language that was added to section 518A.36 in the 2016 amendments. She focuses on the new formula for calculating the parenting-expense adjustment, which depends in part on "the approximate number of annual overnights the . . . children will likely spend with" each parent. Minn. Stat. § 518A.36, subd. 2(b)(1)-(2) (2022); *see also* 2016 Minn. Laws ch. 189, art. 15, § 20, at 235-36. Marlo emphasizes the words "approximate" and "likely" and contends that this new language either requires or allows a district court to engage in fact-finding concerning future amounts of parenting time, based on evidence that goes beyond the court-ordered amounts of parenting time. In response, Daniel contends that the legislature used the words "approximate" and "likely" because the amended statute defines "percentage of parenting time" to mean time spent with a child "averaged over a two-year period." *See* Minn. Stat. § 518A.36, subd. 1.

[1]https://www.lrl.mn.gov/docs/2016/mandated/160242.pdf [https://perma.cc/J63A-P8RT]

C.

The parties' arguments require this court to interpret a statute that we previously have interpreted but the legislature has since amended. [2]

The supreme court has stated that "judicial construction of a statute becomes part of the statute as though written therein." *Caldas v. Affordable Granite & Stone, Inc.*, 820 N.W.2d 826, 836 (Minn. 2012). Stated somewhat differently, if "'a judicial interpretation of a statute has remained undisturbed, it becomes part of the terms of the statute itself.'" *Else v. Auto-Owners Ins. Co.*, 980 N.W.2d 319, 329 (Minn. 2022) (quoting *Wynkoop v. Carpenter*, 574 N.W.2d 422, 426 (Minn. 1998) (citing *Roos v. City of Mankato*, 271 N.W. 582, 584 (Minn. 1937))). These principles are consistent with the presumption "that the legislature acts with full knowledge of existing law," which necessarily includes caselaw. *See Goodyear Tire & Rubber Co. v. Dynamic Air, Inc.*, 702 N.W.2d 237, 244 (Minn. 2005). As a consequence, "'[t]he doctrine of *stare decisis* has special force in the area of statutory interpretation because the Legislature is free to alter what we have done.'" *Koehnen v. Flagship Marine Co.*, 947 N.W.2d 448, 453 (Minn. 2020) (alteration in original) (quoting *Schuette v. City of Hutchinson*, 843 N.W.2d 233, 238 (Minn. 2014)).

[2]Marlo has included in her principal brief a statement concerning whether the opinion in this case should be designated precedential or non-precedential. *See* Minn. R. Civ. App. P. 128.02, subd. 1(f). She requests that the court make it precedential on the ground that the issue before the court "has only briefly been addressed in nonprecedential case law" since the 2016 amendment to the statute and is likely to continue to arise. She asserts that "the bench and bar would benefit from clarity" on the issue. We appreciate the suggestion and take this opportunity to clarify the law.

Between 2009 and 2015, the legislature had several opportunities to alter the rule of law stated in this court's *Hesse* opinion but chose not to do so. In an analogous situation, the supreme court stated, "We see no reason to change our interpretation of [a key word in a statute] when the Legislature has also declined to do so." *State v. Schmid*, 859 N.W.2d 816, 822 (Minn. 2015). For the same reason, we presume that, at least until the 2016 amendment became effective in 2018, section 518A.36, subdivision 1(a), continued to provide that "parenting time, for purposes of parenting-expense adjustment, is determined by the terms of a court order scheduling parenting time." *Hesse*, 778 N.W.2d at 103.

The more pertinent question is whether the legislature altered the rule of law arising from *Hesse* when it amended the child-support statutes in 2016, effective in 2018. In other words, we must ask whether *Hesse*'s holding "remained undisturbed" after the 2016 amendments. *See Else*, 980 N.W.2d at 329 (quotation omitted). It is clear that, in 2016, the legislature intended to make a significant change to the parenting-expense-adjustment formula. *See* 2016 Minn. Laws ch. 189, art. 15, § 20, at 235-36 (amending Minn. Stat. § 518A.36, subd. 2). But that does not necessarily mean that the legislature intended to change the rule of law arising from *Hesse*.

In *Hesse*, we focused on the third sentence of section 518A.36, subdivision 1(a), *Hesse*, 778 N.W.2d at 103, which then provided: "For purposes of this section, the percentage of parenting time means the percentage of time a child is scheduled to spend with the parent during a calendar year *according to a court order*." Minn. Stat. § 518A.36, subd. 1(a) (2008) (emphasis added). We explained that the "plain language" of that statute

"provides that parenting time, for purposes of parenting-expense adjustment, is determined by the terms of a court order scheduling parenting time." *Hesse*, 778 N.W.2d at 103.

In 2016, the legislature amended the third sentence of section 518A.36, subdivision 1(a), only slightly, by adding new language that is indicated below with underlining: "For purposes of this section, the percentage of parenting time means the percentage of time a child is scheduled to spend with the parent during a calendar year according to a court order averaged over a two-year period." 2016 Minn. Laws ch. 189, art. 15, § 20, at 235. It is significant that the legislature did *not* delete the phrase "according to a court order." The retention of that key phrase indicates that the legislature did not intend to change the rule of law arising from our *Hesse* opinion, which was based principally on that phrase. The new language on which Marlo relies, which concerns "the approximate number of annual overnights the . . . children will likely spend with" each parent, does not negate the plain language of the phrase "according to a court order." *See* Minn. Stat. § 518A.36, subds. 1(a), 2(b)(1)-(2). Accordingly, this court's *Hesse* holding is presumed to still be "part of the terms of the statute itself." *See Else*, 980 N.W.2d at 329 (quotation omitted). Thus, we reiterate that, in calculating a parenting-expense adjustment as part of the determination of a child-support obligation, a district court must use the court-ordered amounts of parenting time, not the amounts of parenting time actually being exercised.[3]

[3]We note that our resolution of this issue is contrary to the guidance contained in a commonly used secondary source. *See* 14 *Minnesota Practice—Family Law* § 9.37, 389-90 (2021-22).

Before concluding, we acknowledge Marlo's argument that "policy considerations support [her] argument." She explains that "many parents may not wish to revert to a limited schedule," such as one that is different from court-ordered parenting time, "but merely wish to receive enough support to care for the children appropriately." She further asserts that a parent should be allowed to seek a modification of child support without seeking a modification of parenting time because the latter type of modification might require a custody evaluation and often would require additional time, attorney fees, and costs. These arguments are in tension with our observation in *Hesse* that a contrary rule of law "would encourage litigation by allowing a party to return to court to argue for a parenting-expense adjustment, and consequently a recalculation of support, based solely on that party's failure to exercise scheduled parenting time." *Hesse*, 778 N.W.2d at 103. Otherwise, we refrain from any evaluation of competing policy concerns. Our task is confined to interpreting the plain language of the statute, which is unambiguous. As the supreme court has stated, "we are not in a position to choose between public policy choices when [a statute] unambiguously addresses the question before us." *Auto-Owners Ins. Co. v. Second Chance Invs. LLC*, 827 N.W.2d 766, 773 n.3 (Minn. 2013). Our approach is based on the fundamental principle that "[t]he public policy of a state is for the legislature to determine and not the courts." *Dukowitz v. Hannon Sec. Servs.*, 841 N.W.2d 147, 151 (Minn. 2014) (quotation omitted).

Thus, the district court properly used the court-ordered amounts of parenting time, not the amounts of parenting time actually being exercised, when applying the parenting-expense-adjustment statute.

DECISION

The district court did not err by denying Marlo's motion to modify the existing child-support order.

Affirmed.