STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1647

Mark Richard Boldt, petitioner,
Appellant,

vs.

Iwona Boldt n/k/a Iwona Costigan,
Respondent.

Filed July 18, 2011
Affirmed
Larkin, Judge

Hennepin County District Court
File No. 27-FA-000241365

Thomas B. James, Law Office of Thomas B. James, Cokato, Minnesota (for appellant)

Christopher M. Banas, Banas Family Law, P.A., Eagan, Minnesota (for respondent)

Considered and decided by Wright, Presiding Judge; Connolly, Judge; and Larkin, Judge.

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

LARKIN, Judge

Appellant challenges the district court's denial of his motion to reduce his child-support obligation and the district court's modification of purge conditions associated with a previous conditional-contempt order in the underlying case. We affirm.

FACTS

Appellant-father Mark Richard Boldt and respondent-mother Iwona Boldt were married on July 12, 1997. The couple has one child, B.B., born January 11, 1997. The district court dissolved the parties' marriage on October 1, 1998 and issued an amended judgment and decree on November 6, 2000, granting mother and father joint legal and physical custody of B.B. The amended judgment and decree sets forth a parenting-time schedule that grants father parenting time "every other weekend from Thursdays overnight through Monday morning at 10:00 . . . and every Thursday, overnight thru Saturday morning at 10:00." Under this schedule, father has the child overnight 6 out of every 14 days, which is 43% of the time. The amended judgment and decree required father to pay mother $429 per month in child support.

Over the next ten years, mother and father litigated multiple issues concerning custody and child support. In 2007, the district court reduced father's child-support obligation to $342 per month based on an increase in mother's income. In 2008, the district court increased father's obligation to $410. By 2010, father owed approximately $14,000 in arrearages. Although the amount of father's child-support obligation has fluctuated over time, the terms of the 2000 amended judgment and decree governing father's parenting-time schedule have never been modified.

In 2009, father moved the district court to reduce his child-support obligation and to "reevaluate" the purge conditions associated with a previous conditional-contempt order that resulted from father's failure to pay court-ordered child support. Mother opposed the motion. Following a hearing, the district court increased father's child-

support obligation to $697 per month,[1] as well as the amounts that he must pay as purge conditions. Father moved for an amended order and findings, and the district court denied the motion. This appeal follows.

D E C I S I O N

I.

"The district court has broad discretion when deciding child-support modification issues." *Hesse v. Hesse*, 778 N.W.2d 98, 102 (Minn. App. 2009). The district court's decision will be upheld unless it committed clear error and its decision is against logic and the facts of record. *Moylan v. Moylan*, 384 N.W.2d 859, 864 (Minn. 1986).

Father argues that the district court erred by calculating his percentage of parenting time as 43% instead of 50%, which affects the amount of child support that he must pay. *See* Minn. Stat. § 518A.36, subd. 1(a) (2010) (explaining that a parenting-expense adjustment, i.e. a decrease in the amount of support owed, is calculated based on the percentage of parenting time granted to or presumed for each parent). A parent with scheduled parenting time of 10-45% receives a downward adjustment of 12% to his or her child-support obligation. *Id*., subd. 2 (2010). A parent with scheduled parenting time of 45.1-50% receives a downward adjustment of 50% to his or her child-support obligation. *Id*.

"The 'percentage of parenting time' granted to a parent for the purpose of calculating a parenting-expense adjustment under Minn. Stat. § 518A.36, subd. 1(a) . . .

[1] The district court ordered father to pay basic child support of $494 per month, health-care insurance support of $87 per month, and $116 per month toward arrearages.

means the percentage of parenting time scheduled under an existing court order, regardless of whether the parent exercises the full amount of court-ordered parenting time." *Hesse*, 778 N.W.2d at 100. "The 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; *see* Minn. Stat. § 518A.36, subd. 1(a) (explaining that "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"). "The percentage of parenting time may be determined by calculating the number of overnights that a child spends with a parent . . . ." Minn. Stat. § 518A.36, subd. 1(a).

There can be no dispute that the 2000 amended judgment and decree sets forth a parenting-time schedule that grants father parenting time of 43% and that this schedule has never been modified by court order. In fact, in his district court motion papers, father conceded that his parenting-time schedule is 43% stating, "the actual parenting time schedule was (and is) actually 57/43 percent." Nevertheless, father contends that the district court should have used parenting time of 50% when calculating the parenting-expense adjustment. Father offers two arguments in support of this contention. Neither is persuasive.

Father primarily argues that a finding of fact from a 2008 order determines his percentage of parenting time. The finding states, "[father] and [mother] each have parenting time 50% of the time." But this finding of fact did not modify the parenting-

time schedule in the 2000 amended judgment and decree.[2] Thus, the finding is irrelevant to the percentage-of-parenting-time determination. *See* Minn. Stat. § 518A.36, subd. 1(a) (explaining that "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"); *Hesse*, 778 N.W.2d at 100 ("The 'percentage of parenting time' granted to a parent for the purpose of calculating a parenting-expense adjustment under Minn. Stat. § 518A.36, subd. 1(a) . . . means the percentage of parenting time scheduled under an existing court order . . . .").

Father also argues that the district court should have determined his percentage of parenting time based on a prior stipulation of the parties, which is contained in the 2000 amended judgment and decree. The stipulation states, "[i]n the event the parties modify support in the future sharing joint physical custody, they will continue utilizing this 50/50 formula for support but at their respective incomes at the time of any subsequent modification." But father concedes that "[a] court may choose to ignore the parties' agreement respecting how child support is to be calculated." Moreover, under the plain language of section 518A.36, subd. 1(a), "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*." (Emphasis added.) The only order governing father's parenting time is the 2000 amended judgment and decree, which awards him parenting

[2] The 2008 order did not modify or address the parenting-time schedule. Rather, the order denied father's motions to modify his child-support and arrearage obligations.

time of 43%. Contrary to father's arguments, there is no order setting his parenting time at 50%.

Because the parenting-time schedule set forth in the 2000 amended judgment and decree awards father parenting time of 43%, the district court properly used this percentage when calculating father's parenting-expense adjustment. *See id.* Moreover, the district court properly calculated the parenting-expense adjustment as 12%. *See* Minn. Stat. § 518A.36, subd. 2 (explaining that any percentage of parenting time over 45.1% results in a parenting-expense adjustment of 50%, while parenting time of 10-45% results in an adjustment of 12%).

We next address father's argument that the district court erred in finding that "prior orders do not compel [the district] [c]ourt to ignore the actual parenting time split when this [c]ourt modifies the child support." Father argues that this statement is "directly contrary" to our holding in *Hesse*. We agree. However, the district court found that "[i]t is fact that [f]ather's parenting time is between 10% and 45% pursuant to existing court orders and actual practice." Because the district court ultimately used the percentage of parenting time ordered in the 2000 amended judgment and decree, the district court's suggestion that it was not bound by prior orders concerning the amount of parenting time is not prejudicial and does not provide a basis for reversal. *See* Minn. R. Civ. P. 61 (requiring harmless to be ignored); *Midway Ctr. Assocs. v. Midway Ctr. Inc*., 306 Minn. 352, 356, 237 N.W.2d 76, 78 (1975) (explaining that, to prevail on appeal, an appellant must show both error and prejudice resulting from the error).

In sum, because the parenting-time schedule in the parties' 2000 amended judgment and decree determines father's percentage of parenting time for purposes of calculating his parenting-expense adjustment, we affirm the district court's calculation of father's child-support obligation based on a parenting-expense adjustment of 12%.

II.

Father next argues that the district court violated his due-process rights by increasing his child-support obligation when the only motion before the court was father's motion to decrease his obligation. Due process requires notice and the opportunity to be heard. *Hamann v. Hamann*, 479 N.W.2d 751, 753 (Minn. App. 1992).

Minn. Stat. § 518A.39 (2010) governs the modification of child-support orders. The district court does not have authority to modify a child-support obligation on its own initiative. *See* Minn. Stat. § 518A.39, subd. 1 (allowing modification of child support on motion of either party). But the district court did not modify father's child-support obligation on its own initiative. Father moved the court to reduce his obligation and asked the district court to apply the current child-support guidelines to the parties' current financial circumstances. Although father argued that his income had decreased to $13,000 a year, he told the district court to calculate his obligation as if he were earning $60,000 a year. The district court granted father's request, used $60,000 as his annual income, and correctly determined that this income required an increase in his child-support obligation. *See* Minn. Stat. § 518A.35, subd. 2 (2010) (providing for child support in the amount of $1,245 per month where, as here, the parents have a combined monthly income of $9,817). The district court correctly adjusted father's obligation

based on additional factors, including father's child-support obligation to a non-joint child and the parenting-expense adjustment of 12%. Thus, father received exactly what he asked for: application of the current statutory guidelines to the parties' current financial circumstances.

Father nonetheless asks this court to reverse and remand "with instructions to apply the statutory guidelines to the parties' current financial circumstances, as they have been found to be in the orders under review, but using the 50% allocation of parenting time." As we concluded in Section I, because the existing parenting-time order does not award father parenting time of 50%, he is not entitled to a parenting-expense adjustment based on that figure. Moreover, father cites no legal authority to support his argument that the district court was required to either grant his motion or refrain from any modification. An assignment of error based on mere assertion and not supported by argument or authority is waived unless prejudicial error is obvious on mere inspection. *State v. Modern Recycling, Inc.*, 558 N.W.2d 770, 772 (Minn. App. 1997). Here, inspection of the record does not reveal obvious, prejudicial error.

In sum, father requested modification of his child-support obligation under the current child-support guidelines and received a hearing on his motion. The district court calculated his obligation based on the income level he provided, using the parenting-time percentage set forth in the current parenting-time order, consistent with caselaw and statute. Father's due-process claim does not provide a basis for reversal.

III.

The district court previously found father to be in constructive civil contempt of court for failure to pay child support as ordered. In addition to requesting reduction of his child-support obligation, father moved the court to reevaluate his purge conditions. The most recent purge conditions required father to pay $410 a month toward his child-support and arrearages obligations. The district court reviewed the conditions and increased father's monthly "purge" payment to $697 per month, consistent with the increase to father's monthly child-support obligation. The district court also ordered father to pay mother, as an additional purge condition, $300 quarterly until the arrearages are paid in full. Finally, the district court ordered the parties to appear for a later review hearing in the contempt matter, at which time father's compliance with the purge conditions would be reviewed.

Father challenges the district court's modification of the purge conditions associated with the previous order. But the district court's order setting purge conditions on the existing conditional-contempt order is not a final appealable order, and it therefore is not properly before us for review.[3] *See Johnson v. Johnson*, 439 N.W.2d 430, 431 (Minn. App. 1989) ("A conditional contempt order, which provides a method by which the contemnor may purge the contempt, is not a final appealable order"). The proper appeal is from an order imposing immediate sanctions for failure to comply with the

[3] On February 8, 2011, this court filed a special-term order dismissing father's appeal of the district court's award of attorney fees to mother. Although the order states "[t]he balance of the appeal shall proceed," we now determine that father's challenge to the purge conditions is not appealable at this time.

purge conditions. *See id*. We therefore do not address father's challenge to the modified purge conditions.

Affirmed.

Dated:

Judge Michelle A. Larkin