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**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-2299**

In re the Marriage of:
Danielle K. Geisler, n/k/a Reitan, petitioner,
Respondent,

vs.

Kenneth I. Geisler,
Appellant.

**Filed October 3, 2011
Affirmed in part, reversed in part; motions granted
Ross, Judge**

Hennepin County District Court
File No. 27-FA-000285414

Jonathan J. Fogel, Fogel Law Offices, P.A., Minneapolis, Minnesota (for respondent)

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Considered and decided by Hudson, Presiding Judge; Worke, Judge; and Ross,
Judge.

UNPUBLISHED OPINION

ROSS, Judge

Spousal maintenance recipient Danielle Reitan and obligor Kenneth Geisler both moved the district court to modify Geisler's monthly obligation. Reitan moved to increase the obligation because she stopped receiving child support, and Geisler moved to

decrease it because Reitan's earning potential increased. Geisler also asked the district court to order Reitan to sell her house to satisfy Geisler's lien on it. The district court granted Reitan's motion and denied Geisler's, increasing Geisler's monthly spousal-maintenance obligation from \$1,945 to \$3,250 and requiring him to purchase a life-insurance policy to secure it. It also required Geisler to pay \$15,000 of the \$42,000 Reitan incurred in attorney fees for the modification dispute. Geisler appeals to contest the modification and also to challenge the district court's failure to require Reitan to sell the house. After appellate briefs were submitted, Geisler learned that Reitan had already sold the house, so he moved this court to dismiss the portion of his appeal relating to the house sale and asked us to order Reitan to pay him \$750 in conduct-based attorney fees to cover the amount he spent appealing that issue unnecessarily. We reverse in part because the facts do not justify the increase in spousal maintenance, the requirement to obtain life insurance, or the award of attorney fees. We affirm in part because Geisler did not prove every element needed to justify a reduction in spousal maintenance. And we grant both of Geisler's motions on appeal.

FACTS

Danielle Reitan and Kenneth Geisler were married for 25 years and had two boys before they divorced in 2005. Since the divorce, the district court has issued more than 25 orders and entered four judgments. In the course of six years, the parties, whose total annual gross income at the time of the dissolution was roughly \$150,000, have incurred attorney fees exceeding that amount, mostly disputing spousal maintenance and child support. We summarize only those district court orders relevant to this appeal.

Initial Divorce Decree (as amended)

Spousal maintenance is the central issue of this appeal. The purpose of spousal maintenance is to afford assistance to a party who is not financially self sufficient based on the marital standard of living. *See* Minn. Stat. § 518.552, subd. 1(b) (2010). When the district court initially set the spousal-maintenance obligation, it described Geisler and Reitan’s standard of living during their marriage as reflecting “a frugal middle-class lifestyle.” Their home was “a modest one” that was “in need of repairs.” And “[t]hey drove older model cars[,] . . . rarely went on vacation, and when they did, they usually stayed with relatives.”

The district court also considered both spouses’ ability to earn an income that would allow them to maintain that standard of living after the dissolution. Geisler’s employment had been the parties’ only income source. During most of the marriage, Giesler worked and Reitan cared for the children. But the district court found that Reitan could also earn money. It found that she “is an intelligent individual with an excellent educational background but limited work experience.” It noted that she held bachelor and master’s degrees in elementary education and a certificate in drafting. It also noted that since the parties’ 2003 separation, Reitan’s efforts to find a job “have been minimal.” A vocational evaluation revealed that Reitan was capable of sustained employment earning just over \$20,000 per year. It also noted that if she returned to school (at a cost of \$40,000 over two years), which she wanted to do, she could expect to earn \$35,000 annually after graduation.

The district court decided to facilitate Reitan's education by offsetting the parties' property award by \$40,000 so Reitan could attend school for two years. The district court also imputed no income to her for the period during which she was enhancing her education.

The district court set Geisler's monthly child-support obligation at \$1,945 and his permanent-spousal-maintenance obligation at \$2,507, for a total obligation of \$4,452 per month. This, it held, was less than Reitan's living expenses, which it found to be \$5,770 per month while she cared for the two children. It found that Geisler could not meet all of Reitan's expenses and still meet his own, at \$3,404 per month.

Order Regarding Life Insurance to Secure Spousal Maintenance

The judgment and decree did not require Geisler to maintain life insurance. In September 2006, Reitan moved the district court to order Geisler to obtain a life-insurance policy for \$500,000 to secure his spousal-maintenance obligation. The district court denied the motion. The order denying the motion was never appealed.

Previous Orders about Reitan's Income

In February 2008, Geisler moved the district court to modify spousal maintenance, claiming that Reitan should have completed two years of education, acquired a job, and begun supporting herself. He requested that the court impute a \$35,000-per-year income to her. In May, the district court found that Reitan had not acted in bad faith in her education and job-search efforts. In an affidavit she provided to the court, Reitan admitted that she spent the \$40,000 that she was granted to spend on her education expenses to pay part of the \$160,000 in attorney fees she incurred during the divorce. She

then went through a Chapter 7 bankruptcy. Reitan found an online curriculum in medical coding that she said she would complete in 2009. Taking Reitan's affidavit testimony as true, the district court assigned to her \$20,000 per year in potential income, effective October 1, 2009. Beginning then, monthly spousal maintenance would automatically reduce to \$1,717 and child support to \$1,397. Three months later the district court amended its order and increased spousal maintenance to \$1,820. Two months after that, Geisler moved to amend the amended orders, and the district court denied that motion.

In September 2009, just before spousal maintenance was set to reduce, Reitan moved the district court to prevent the imputation of income. The district court denied the motion, observing that the reason she had not found a job is that she had only applied for five in her field. Beginning October 2009, \$20,000 in potential annual income was assigned to Reitan.

Current Litigation

From June through October 2010 the district court issued a series of orders that culminated in a December 2010 judgment, which is the subject of this appeal. Reitan sparked the litigation in June by moving the district court to modify spousal maintenance on the basis that her youngest son's turning 18 constituted a "change in circumstances" for which she is entitled to increased spousal maintenance. The district court temporarily raised spousal maintenance to \$3,000 and ordered an evidentiary hearing to help determine future spousal maintenance, scheduled for August. During the two-month gap, Reitan was ordered to undergo a new vocational evaluation, which Giesler was required to pay for.

The district court continued the August hearing to October. And in September, both parties moved to modify spousal maintenance. Reitan sought an increase to \$3,500 and Geisler sought a decrease to \$500. Geisler also moved the district court to require Reitan to sell her house to satisfy his lien on it.

After an evidentiary hearing, the district court issued an order on October 28 directing Geisler to pay spousal maintenance increased to \$3,250 per month. It did so after it found that Reitan's monthly expenses were \$4,136, reasoning, "just because [Reitan's] children no longer live in her home, does not mean that her monthly expenses will automatically decrease." It then imputed to her an annual income of \$27,040, accepting the low end of an expert's estimation of her earning potential, and it required Geisler to pay the difference between her imputed income and her expenses. In addition to increased spousal maintenance, Geisler was required to pay Reitan \$15,000 in need-based attorney fees and to obtain a life-insurance policy to secure his spousal-maintenance obligation. The district court did not address Geisler's motion to require Reitan to sell the house.

Geisler appeals.

DECISION

Geisler's appeal challenges the district court's order as it regards spousal maintenance, life insurance, attorney fees, and the sale of the homestead. After appellate briefing was completed, Geisler learned that Reitan had already sold the house. So by motion to this court, Geisler asks us to dismiss the portion of his appeal related to the sale

and to award him \$750 in conduct-based attorney fees based on Reitan's failure to tell him about the sale.

I

We first address whether the district court properly modified spousal maintenance. The district court has broad discretion to modify a spousal-maintenance order. *Claybaugh v. Claybaugh*, 312 N.W.2d 447, 449 (Minn. 1981). But it must exercise that discretion within the mandates of the spousal-maintenance-modification statute. *Id.* This court will reverse the district court's modification decision if the district court failed to follow the statute, came to an illogical decision, or relied on clearly erroneous findings against the facts in the record. *Rutten v. Rutten*, 347 N.W.2d 47, 50 (Minn. 1984). Geisler raised this issue to the district court, which considered and rejected his arguments.

Spousal maintenance may be awarded to a spouse after a divorce if that spouse is deemed to lack the resources to be self-sufficient, "considering the standard of living established during the marriage." Minn. Stat. § 518.552, subd. 1(b) (2010). Once the district court orders spousal maintenance, it may modify the maintenance amount if the spouse seeking the modification demonstrates that there has been a substantial change in circumstances since the most recent modification. *See* Minn. Stat. § 518A.39, subd. 2 (2010). The types of circumstances that would permit modification are listed in Minnesota Statutes section 518A.39, subdivision 2, and include, for example, situations in which one spouse has a significant increase or decrease in gross income or a significant increase or decrease in need. *Id.* In addition to proving a substantial change in circumstances, the spouse seeking the modification must also prove that, as a result of the

change, the current maintenance award is “unreasonable and unfair.” *Id.*; *Hecker v. Hecker*, 568 N.W.2d 705, 709 (Minn. 1997).

Geisler challenges the district court’s conclusion that each of the following three circumstances independently demonstrated a change in circumstance requiring modification: Reitan’s income was substantially decreased because child support ended; Geisler’s income substantially increased; and Reitan’s need substantially increased. We address each basis for the spousal-maintenance increase, and we find them lacking.

Children’s Emancipation

We believe that the district court abused its discretion by finding a substantial change in circumstances based on the children’s emancipation. At the October 2010 hearings and in its subsequent order, the district court referenced a previous order, in which it had noted that “once the parties’ children emancipated, and the child support payments ceased, [Reitan] may have a need for additional spousal maintenance payments.” The district court characterized this statement as “the law of this case” such that the “loss of child support [may be] a substantial change in circumstances.” The district court then concluded that the child-support termination was itself a substantial change in circumstances warranting modification.

Geisler correctly argues that terminating child support does not constitute a substantial change in circumstances because Reitan’s gross income never included Geisler’s child support payments. The statutory basis Reitan relied on to prove a change of circumstance was one permitting modification on a showing of “substantially . . . decreased *gross income* of an obligee” resulting in an unreasonable or unfair maintenance

award. See Minn. Stat. § 518A.39, subd. 2(a)(1) (emphasis added). But section 518A.29(e) provides that “[g]ross income does not include a child support payment received by a party.” So the mere loss of child support cannot constitute a decrease in gross income. See *Lee v. Lee*, 775 N.W.2d 631, 635 n.5 (Minn. 2009) (holding that the gross-income definition in section 518A.29 applies to chapter 518 spousal maintenance).

In arguing that the termination of child support alone is a sufficient basis on which a party can obtain increased spousal maintenance, Reitan relies on an unpublished opinion of this court in which we commented in dictum that one of the parties in that case “may petition for a modification of the award . . . if, by the time child support ends, the parties’ circumstances have substantially changed.” *Collin v. Guay*, No. A09-2354, 2010 WL 2813562, at *4 (Minn. App. July 20, 2010). But our statement was *not* that the loss of child support *constitutes* a substantial change; it was that so long as the party seeking modification can *prove* a substantial change, they may seek modification after the child support ends.

Appellant’s Increased Income

Geisler next argues that the district court abused its discretion by finding a substantial change in circumstances based on Geisler’s increased gross income. The district court noted during the hearing that Geisler’s monthly income had increased from \$11,000 (in 2005) to \$15,000 (in 2010). And it concluded that this change constituted a substantial change in circumstances.

The district court’s reasoning is flawed in three ways. First, the district court relied on the wrong measuring points. In determining whether there has been a substantial

change in circumstances, the focus is on the change since the award was last modified. *Blomgren v. Blomgren*, 386 N.W.2d 378, 380 (Minn. App. 1986). The district court measured Geisler's change in income since the dissolution judgment and decree, not since the most recent 2008 modification. The change in monthly income between 2008 (\$12,596) and 2010 (\$14,750) reflects only a 17% increase.¹ The increase is not enough to be presumed substantial. *See* Minn. Stat. § 518A.39, subd. 2(b)(1) (stating that a 20% increase in a spouse's income may be presumed to be a substantial change in circumstances). Because the increase is not presumed to be substantial, the district court should have explained why it found that it was. It did not.

Second, the district court failed to explain why Geisler's income increase resulted in an "unreasonable and unfair" spousal-maintenance arrangement. *See* Minn. Stat. § 518A.39, subd. 2(a). As of the last modification, the district court determined that Geisler's spousal maintenance (supplemented by his child support) provided sufficient support to accommodate Reitan's reasonable budget, which included expenses for caring for the minor children. Geisler's increased income does not affect Reitan's ability to meet her own expenses.

Third, the district court did not adequately consider the extent to which Geisler's income increase had already been accounted for. *See* Minn. Stat. § 518A.75 (2010) (requiring cost-of-living increases every other year). The spousal-maintenance amount

¹ Geisler contests the 2010 income finding. Using Geisler's numbers, the increase in salary from 2008 to 2010 is 8.5%. Reitan argues that the increase is 17%. For the sake of argument, we will assume the 17% number.

had increased periodically based on cost-of-living increases, and in 2009, was increased by 6.3%, or \$157 per month, accounting for part of the 17% increase in Geisler's income.

Increase in Reitan's Monthly Expenses

The district court concluded that Reitan's monthly expenses of \$4,136 reflect an increase since 2008. It reasoned that because child support terminated, spousal maintenance and her imputed income must now cover her entire monthly budget. Geisler contests the following findings that underlay the conclusion Reitan's need increased: (1) that "just because [Reitan's] children no longer live in her home, [it] does not mean that her monthly expenses will automatically decrease," and (2) that Reitan's reasonable monthly expenses are actually \$4,136.

The first challenged finding appears to be clearly erroneous. It is undisputed that many of Reitan's 2008 expenses were for her children, which, because of their emancipation, she no longer incurs. For example, Reitan had included \$727.47 for her son's monthly meals, personal hygiene products, haircuts, and school equipment, supplies, and fees. The district court did not identify any new reasonable expenses that have offset the child-related expenses.

The second finding is clearly erroneous. Reitan's 2010 budget includes expenses that appear to exceed the marital standard of living, which had reflected a "frugal middle-class lifestyle." For example, Reitan lists \$225 per month in pet food and veterinary expenses even though no pet expenses were part of her budget in the 2008 modification. She also includes Culligan water expenses that the parties did not incur during their

marriage and that have never appeared in any previous budget. The district court clearly erred by not accounting for the disparity.

Because the finding that Reitan's reasonable expenses increased since 2008 is clearly erroneous, it cannot be a basis for finding a change in circumstances.

II

Geisler also argues that the total amount of spousal maintenance ordered is excessive. Because we conclude that the district court erred by modifying spousal maintenance, we do not address this issue.

III

Geisler argues that the district court erred by not granting his motion to reduce spousal maintenance in light of Reitan's increased potential income.

The district court found that, since 2008, Reitan is capable of earning \$27,000 annually instead of only \$20,000. Geisler argues that this change constitutes a 35% increase in income, which is a presumed change in circumstances entitling him to a reduction in spousal maintenance. But Geisler's argument is not complete because he failed to argue to the district court or to us that maintaining the 2008 spousal-maintenance amount is unreasonable or unjust. *See* Minn. Stat. § 518A.39, subd. 2.

IV

Geisler argues that the district court erred by requiring him to obtain life insurance to secure his spousal maintenance obligation because the insurance issue had been conclusively decided in 2006. We ordinarily review the district court's decision whether or not to require a party to obtain life insurance to secure a spousal maintenance

obligation for abuse of discretion. *O'Brien v. O'Brien*, 343 N.W.2d 850, 852 (Minn. 1984). But here the standard is narrower because Geisler did not make any posttrial motions and the parties did not argue this issue, nor did the district court consider it at the trial. *Alpha Real Estate Co.*, 664 N.W.2d at 310. We will therefore affirm the decision if “the evidence sustains the findings of fact” and the “findings sustain the conclusions of law and the judgment.” *See Erickson*, 434 N.W.2d at 286. Here the findings do not support the conclusions of law and we reverse.

Geisler’s primary argument is that when the district court denied Reitan’s motion to require him to obtain life insurance in 2006, the issue was conclusively decided and cannot now be changed. He relies on the doctrines of res judicata and the law of the case, which ordinarily prevent continued litigation of issues already decided by the district court. *See In re Welfare of M.D.O.*, 462 N.W.2d 370, 375 (Minn. 1990) (stating that the law of the case doctrine applies to issues “decided in earlier stages of the same case”); *Demers v. City of Minneapolis*, 486 N.W.2d 828, 830 (Minn. App. 1992) (noting that res judicata precludes litigation if there is a prior ruling on merits of an issue). These doctrines do apply in family-law cases, but with two exceptions: district courts are permitted to modify spousal maintenance or child support under the support-modification statute, Minn. Stat. § 518A.39. *Rydell v. Rydell*, 310 N.W.2d 112, 114 (Minn. 1981). So for Geisler’s argument to succeed, either the life insurance obligation is not considered part of spousal maintenance, or Reitan failed to prove a change in circumstances. Only the latter is true.

The supreme court treats the requirement to insure spousal maintenance as part of spousal maintenance, so we will too. *See O'Brien*, 343 N.W.2d at 853 (“Because the husband is responsible for maintenance, so should he bear the cost of insurance protection for that maintenance.”); *Arundel v. Arundel*, 281 N.W.2d 663, 667 (Minn. 1979) (justifying the requirement to secure spousal maintenance, stating, “We recognize that in the exceptional case the reasons which justify granting permanent alimony, in this case the long duration of the marriage and petitioner's age and lack of marketable skills, also justify the securing of that alimony.”).

But the fact that the insurance decision can generally be modified does not resolve our issue. Here it cannot be modified because Reitan failed to prove a change in circumstances warranting spousal-maintenance modification.

V

We turn to Geisler’s challenge to the district court’s ordering need-based attorney fees under Minnesota Statutes section 518.14 (2010). We review the district court’s decision to award attorney fees under section 518.14 for abuse of discretion. *Crosby v. Crosby*, 587 N.W.2d 292, 298 (Minn. App. 1998), *review denied* (Minn. Feb. 18, 1999).

The district court may require the more financially secure former spouse to pay the other’s attorney fees, so long as those fees are necessary for the good-faith assertion of the other’s rights. Minn. Stat. § 518.14. The district court ordered Geisler to pay \$15,000 of the \$42,000 Reitan incurred to litigate her motion to modify spousal maintenance. In requiring Geisler to pay the fees, the district court made the following findings under section 518.14, subdivision 1:

- (1) that the fees are necessary for the good faith assertion of Petitioner's rights in the proceeding and will not, nor have not, contributed unnecessarily to the length and expense of the proceeding;
- (2) that Respondent has the means to pay Petitioner attorneys fees; and
- (3) that Petitioner does not have the means to pay her own attorneys fees.

The third finding is not supported by the evidence. As discussed, the district court's findings regarding Reitan's reasonable expenses are clearly erroneous. We therefore cannot sustain an award of attorney fees based on it.

VI

We now address Geisler's motions to this court, first considering the motion to dismiss the portion of his appeal related to the district court's failure to require Reitan to sell her house. Geisler initially raised this issue in his statement of the case. He addressed it in his brief, Reitan addressed it in her response brief, and Geisler addressed it again in his reply brief. One month after submission of his reply brief, Geisler's attorney contacted him and told him that Reitan had already sold the house back in February, two months before Geisler filed his first brief. Because she sold the house, his argument relating to the need to require the sale is now moot, and we therefore grant his motion.

We next address Geisler's motion for \$750 in conduct-based attorney fees, which he claims he is entitled to because the fees were incurred appealing this moot issue. This court may award conduct-based attorney fees, "in its discretion," "at any point in the proceeding," "against a party who unreasonably contributes to the length or expense of

the proceeding.” Minn. Stat. § 518.14, subd. 1; *Clark v. Clark*, 642 N.W.2d 459, 466 (Minn. App. 2002) (noting that whether to award attorney fees on appeal is within the court of appeals’ discretion). Because Geisler incurred \$750 in expenses drafting and responding to an issue that Reitan knew, but failed to disclose, was already resolved, we grant this motion as well.

VII

Because the district court erred by finding that Reitan proved a change in circumstances, we reverse the district court’s order modifying spousal-maintenance and requiring Geisler to secure it with life insurance. But because Geisler failed to prove that modification is needed to avoid an unjust or unreasonable result, we affirm the district court’s order denying his modification motion. We reverse the district court’s order requiring Geisler to pay need-based attorney fees because they are supported by erroneous findings regarding Reitan’s monthly budget, and we grant Geisler’s motion for \$750 in conduct-based attorney fees on appeal because Reitan’s conduct unreasonably contributed to Geisler’s expense in the appeal. We also grant Geisler’s motion to dismiss the portion of his appeal related to requiring the sale of the house because the house has been sold.

Affirmed in part, reversed in part; motions granted.