STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1128

In re the Marriage of:
Danielle M. Kerr, n/k/a Danielle Dubois, petitioner,
Respondent,

vs.

Jonathan R. Kerr,
Appellant.

Filed February 27, 2012
Affirmed
Huspeni, Judge[*]

Dakota County District Court
File No. 19-F8-07-010912

Christine J. Cassellius, Jessica L. Sanborn, Severson, Sheldon, Dougherty & Molenda, P.A., Apple Valley, Minnesota (for respondent)

Jonathan R. Kerr, Minneapolis, Minnesota (pro se appellant)

Considered and decided by Bjorkman, Presiding Judge; Connolly, Judge; and Huspeni, Judge.

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

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

HUSPENI, Judge

In this child-support dispute, appellant challenges the district court's denial of his motion to modify his child-support obligation and argues that the district court (1) miscalculated the basic support obligation and thus erroneously concluded that appellant's increased income does not render the existing child-support order unreasonable or unfair, and (2) abused its discretion by concluding that appellant's parenting-time percentage is below 45.1% because consideration was not given to holidays or significant time periods in which the parties' children are in appellant's care but do not stay overnight. Because the district court did not abuse its discretion in determining either appellant's child-support obligation or his parenting-time percentage, we affirm.

FACTS

Appellant Jonathan R. Kerr and respondent Danielle M. Kerr petitioned the district court to dissolve their marriage in September 2007. Several months later, respondent moved the district court for temporary child support, child-care support, and medical support for the parties' two minor children. The parties submitted a parenting-time schedule whereby appellant would have the children for six overnights and respondent would have the children for eight overnights during every two-week period. The district court adopted the parties' proposed biweekly parenting-time schedule and ordered appellant to pay monthly basic child support of $1,135. In reaching that amount, the district court utilized three methods to calculate appellant's parenting-time percentage.

Under each method the district court concluded that appellant's parenting time under the biweekly parenting-time schedule is less than 45%.[1]

At the dissolution hearing in April 2008, appellant contended that his Sunday parenting time should be extended to Sunday overnights, that the parent responsible for picking up the children from daycare at the end of the day should be considered the responsible parent during the day, and that the parenting-time percentage should include holiday time and exclude daycare time. In the resulting August 2008 dissolution decree, the district court calculated appellant's basic monthly child-support obligation to be $1,141, affirmed the existing biweekly parenting-time schedule, adopted a parenting-time schedule for holidays and vacation time, and determined that appellant's parenting time was 42.8%. The district court also concluded that appellant's requested changes to the biweekly parenting-time schedule for Sunday overnights was "not conducive to a stable and consistent schedule for the minor children," and that the parent who takes the children to daycare in the morning is the responsible parent during the day.

Appellant moved for amended findings, arguing that the district court should not have determined the parties' parenting-time percentage without considering the vacation and holiday parenting-time schedules or the amount of time each day that the children actually spend with each parent. The district court denied the motion as untimely. On appeal to this court, appellant did not challenge the parenting-time schedule or the

[1] Under Minnesota's child-support statute, the calculation of a parent's child-support obligation is adjusted based on the parent's parenting-time percentage. Minn. Stat. § 518A.36 (2010).

calculation of his parenting-time percentage, and this court's resulting opinion addressed other matters.

In November 2009, appellant moved the district court to modify the biweekly parenting-time schedule and child-support obligation, and specifically renewed his request that his Sunday parenting time be extended to overnights and that the parent responsible for picking up the children at the end of the day be considered the responsible parent during that day. Again, the district court denied the motion, concluding that modifying the biweekly parenting-time schedule is not in the children's best interests. Appellant's motion for amended findings was denied.

In May 2010, appellant brought a motion before the child-support magistrate that included a request to recalculate the parenting-time percentage to reflect "the actual parenting time each party has with their minor children." The child-support magistrate declined to consider this aspect of appellant's motion, concluding that the issue had already been "fully and fairly litigated" and decided by the district court. The district court denied appellant's motion to review the order of the magistrate.

In January 2011, appellant moved the district court to recalculate appellant's parenting-time percentage; appellant argued that his increased income resulted in a change in circumstances making the terms of the existing child-support order unreasonable and unfair. He sought recalculation of the parenting-time percentage, to reflect the actual parenting time each party has with their children, using a two-year calendar reflecting the parties' vacation time and holidays throughout the year rather than using the biweekly parenting-time schedule as representative of a full year. Appellant

prepared and presented such a calendar to the district court. In an April 19, 2011 order, the district court concluded that the change in circumstances from appellant's increased income did not make the terms of the existing child-support order unreasonable or unfair. But the district court recalculated the parties' parenting-time percentages to account for the two overnights gained by appellant based on each party's annual two-week vacation time with the children. The district court declined to consider holidays in its recalculation, concluding that "there is no significant gain or loss of overnights by either party" due to holidays because the parties alternate holidays each year. The district court recalculated appellant's parenting-time at 43.4%, which does not change appellant's child-support obligation. This appeal followed.

D E C I S I O N

I.

Appellant challenges the denial of his motion to modify his child-support obligation based on his increased income.[2] District courts have broad discretion in determining whether to modify child-support orders. *Ludwigson v. Ludwigson*, 642 N.W.2d 441, 445 (Minn. App. 2002). The district court may modify an existing child-

[2] We note that appellate courts rarely, if ever, address this argument in a stand-alone appeal. *Cf. In re D.T.R.*, 796 N.W.2d 509, 513 (Minn. 2011) (noting that, to have standing to appeal, a party must be aggrieved by the ruling at issue or have standing conferred by statute). Success on this issue would result in an increase in appellant's dollar-contribution to child support—a result that one would hope would be universally agreed upon by parents of minor children and obviate any continued litigation. But here, success on the second part of appellant's motion—his request that his parenting time be established as more than 45.1%—would result in a substantial reduction of his support contribution. Support and parenting-time issues are yoked together in Minn. Stat. §§ 518A.27-.39 (2010), and appellant has yoked them together in his motion.

support obligation if the moving party demonstrates a substantial change in circumstances that renders the existing child-support obligation unreasonable and unfair. Minn. Stat. § 518A.39, subd. 2(a); *Bormann v. Bormann*, 644 N.W.2d 478, 480-81 (Minn. App. 2002). On appeal, we will not alter that decision absent an abuse of discretion. *Ludwigson*, 642 N.W.2d at 445. A district court abuses its discretion if it resolves the matter in a manner that is against logic and the facts on the record. *Id.*

Minn. Stat. § 518A.39, subd. 2(a) identifies eight types of changes that may qualify for modification, including the "substantially increased or decreased gross income" of one parent. Generally, the party requesting modification of the existing child-support order has the burden of demonstrating both a substantial change in circumstances and the unfairness and unreasonableness of the existing child-support order because of that change. *Bormann*, 644 N.W.2d at 481. But the modification statute also provides (1) a presumption of a substantial change in circumstances and (2) a rebuttable presumption of unreasonableness and unfairness if "the application of the child support guidelines in section 518A.35, to the current circumstances of the parties results in a calculated court 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 this 20% and $75 difference is established, the presumption of a substantial change in circumstances is irrebuttable, but the presumption of unreasonableness and unfairness is rebuttable. *Frank-Bretwisch v. Ryan*, 741 N.W.2d 910, 914 (Minn. App. 2007).

Appellant based his motion to modify child support on the increase in his gross monthly income from $6,536 to $9,295 during the period between August 2008 and

December 2010. Respondent's monthly income also increased from $5,505 to approximately $6,667 during that same period. Neither party disputes these increases. In acknowledging these new income amounts, the district court concluded that appellant's monthly support obligation would be $1,302; a change of more than $75, but less than 20%, from appellant's existing monthly obligation. Thus, the district court ruled that the statutory presumptions were not present in this case, and otherwise concluded that there had not been a substantial change in circumstances making the existing child-support order unreasonable and unfair.

The parties agree, however, that the district court miscalculated appellant's new monthly basic child-support obligation. We agree; the parties correctly calculate a new monthly basic child-support obligation of $1,392,[3] a figure that is both $75 more and 22% higher than the existing obligation and meets the irrebuttable presumption of the statute. Minn. Stat. § 518A.39, subd. 2(b); *see also Frank-Bretwisch*, 741 N.W.2d at 914 (holding that presumption of a substantial change in circumstances is irrebuttable). Thus, the district court erred by concluding that there was not a substantial change in circumstances.

Respondent argues that the district court's miscalculation of appellant's child-support obligation is not reversible error because appellant was not harmed by the error.

[3] The parties' new combined gross income is $15,962 monthly, resulting in appellant's pro rata basic support obligation of $1,582. *See* Minn. Stat. § 518A.35 (guideline for determining basic support obligation). After applying the 12% parenting expense adjustment, Minn. Stat. § 518A.36, appellant's new support obligation is reduced to $1,392. After adding medical and child-care expenses, which have also increased, appellant's resulting monthly total child-support obligation is both 22% and more than $75 higher than his existing monthly total child-support obligation.

We agree. To prevail on appeal, a party must show both error by the district court and that the error prejudiced the complaining party. *Midway Ctr. Assocs. v. Midway Ctr., Inc.*, 306 Minn. 352, 356, 237 N.W.2d 76, 78 (1975); *see also* Minn. R. Civ. P. 61 (requiring harmless error to be ignored). Here, appellant's change in gross monthly income would result in a $251 *increase* in his monthly basic child-support obligation. Thus, appellant was not prejudiced by the district court's error.[4]

Finally, we note again that while a presumption of changed circumstances, as is present here, is irrebuttable, that presumption is, by itself, insufficient to permit a modification of child support. *See* Minn. Stat. § 518A.39, subd. 2(b)(1); *Frank-Bretwisch*, 741 N.W.2d at 914. There must be both changed circumstances and a finding—not just a statutorily-created rebuttable presumption—that the terms of the existing support order are unreasonable and unfair. Here, the existing support order is not unreasonable and unfair regarding appellant because, as noted above, any modification of his support obligation would result in an increase in his obligation.

II.

Appellant next argues that the district court abused its discretion because it did not consider the effect of holidays or significant time periods in which the parties' children are in appellant's care when the district court concluded that appellant's parenting-time percentage is below 45.1%. The parenting-expense-adjustment statute requires that a

[4] To the extent that appellant also seeks recalculation of his parenting-time percentage on this basis, we observe that appellant's argument is unavailing. Neither Minnesota law, nor appellant's brief, provides a legal basis for recalculating a party's parenting-time percentage based on a party's substantial increase in income.

child-support order "shall specify the percentage of parenting time granted to or presumed for each parent." Minn. Stat. § 518A.36, subd. 1(a). The yoking together of support and parenting time is expressed in the parenting-expense-adjustment statute, which provides for a 12% adjustment to the basic child-support obligation if the obligor's parenting-time percentage is between 10% and 45%; but if the obligor's parenting-time percentage is between 45.1% and 50%, parenting time is presumed equal and an alternative adjustment is applied to the basic child-support obligation. Minn. Stat. § 518A.36, subds. 2-3. Under that alternative adjustment, and accounting for the parties' increased incomes, appellant's monthly basic child-support obligation would decrease from $1,141 to $327. *See id.*, subd. 3(b).

A.

As a threshold matter, respondent argues that appellant forfeited his challenge to the district court's calculation of his parenting-time percentage because he failed to raise the issue in his first appeal to this court. "The failure to raise and preserve an issue before the court of appeals constitutes a waiver in a subsequent appeal . . . ." *In re Welfare of M.D.O.*, 462 N.W.2d 370, 379 (Minn. 1990) (citing *L & H Transp., Inc. v. Drew Agency, Inc.*, 403 N.W.2d 223, 226 (Minn. 1987)); *accord Wilcox v. Hedwall*, 186 Minn. 500, 501, 243 N.W. 711, 712 (1932) (holding that all issues that could have been raised on former appeal are concluded by former decision); *Hibbs v. Marpe*, 84 Minn. 178, 179, 87 N.W. 363, 363 (1901) (holding that all issues that "were or might have been raised on a former appeal in the same action" are barred by res judicata); *see also Dieseth v. Calder Mfg. Co.*, 275 Minn. 365, 370, 147 N.W.2d 100, 103 (1966) (stating that

"[e]ven though the decision of the [district] court in the first order may have been wrong, if it is an appealable order it is still final after the time for appeal has expired").

The existing biweekly parenting-time schedule has been in place since the district court issued its temporary order in March 2008. This schedule was incorporated in the August 2008 dissolution judgment and decree, in which the district court concluded that appellant's parenting-time percentage is below 45%. Appellant did not challenge this calculation when he appealed the judgment.[5] Because he could have, but did not, raise this issue in his first appeal to this court, appellant did not properly preserve this issue and it is forfeited.[6] Accordingly, this issue is beyond the scope of this appeal.

B.

Even if appellant had not forfeited this issue and we were to address the issue on its merits, appellant would not prevail. "The district court has broad discretion when deciding child-support modification issues." *Hesse v. Hesse*, 778 N.W.2d 98, 102 (Minn. App. 2009). But interpretation of the parenting-expense-adjustment statute is a legal issue, which we review de novo. *Id.*

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[5] In *Kerr v. Kerr*, 770 N.W.2d 567 (2009), this court affirmed the marital/nonmarital homestead equity allocation but reversed and remanded on the issue of the parties' interests in retirement accounts. Child-support and parenting-time issues were not raised in the appeal by either party.

[6] Appellant argues that, because the district court recalculated his parenting-time percentage in its April 2011 order, the new calculation is now appealable. But he does not challenge the district court's recalculation of his parenting-time percentage to account for vacation time, which is favorable to him. And to the extent that the district court declined to consider other aspects of the parenting-time schedule in its April 2011 calculation, the district court merely affirmed and clarified its decision from March and August 2008. Thus, appellant is challenging the district court's initial calculation, which is a forfeited issue.

Contrary to appellant's argument, Minn. Stat. § 518A.36, subd. 1(a) does not require a particular method of calculating the percentage of time a child is scheduled to spend with a parent during a calendar year according to a court order, but grants the district court discretion in its choice of calculation methods:

> The percentage of parenting time *may* be determined by calculating the number of overnights that a child spends with a parent, *or* by using a method other than overnights if the parent has significant time periods on separate days where the child is in the parent's physical custody and under the direct care of the parent but does not stay overnight.

Id. (emphasis added); *see also* Minn. Stat. § 645.44, subd. 15 (2010) (providing that "may" is permissive). The plain language of the statute does not require the district court to use a "significant time periods" method or any other method, even if the overnight method does not reflect significant other periods of parenting time. Moreover, the record reflects that the district court, in its March 2008 temporary order, calculated appellant's parenting-time percentage using three different methods—overnights, hourly, and half-day calculations—and each method resulted in appellant having a parenting-time percentage below 45%. That temporary order was based on the then-existing parenting-time schedule. There was no abuse of discretion by the district court when it calculated appellant's parenting-time percentage based on overnights.

Appellant also contends that the time the children spend in daycare should not be credited to either parent's parenting-time percentage because neither parent is in direct care of the children during that time. The district court recognized that the children may require a parent during the day, determined that the parent who takes the children to

daycare is the "responsible" parent during daycare hours in the event that a child is ill, and credited that parent with those hours. This conclusion was well within the district court's broad discretion. *Cf. Hesse*, 778 N.W.2d at 103 (holding that parenting-time percentage is based on time that child is *scheduled* to spend with parent regardless of whether parent actually exercises scheduled parenting time). In addition, because the district court's method of allocating this responsibility also credits appellant for daycare hours on the days in which he takes the children to daycare, it is not unfairly biased toward respondent. Moreover, even if daycare hours were credited to neither parent, appellant's parenting-time percentage would remain below 45.1%.[7] Thus, the district court's method of crediting daycare hours was not an abuse of discretion and did not prejudice appellant.

Appellant next argues that the district court's use of the biweekly parenting-time schedule as representative of a full calendar year was an abuse of discretion because it did not accurately reflect the effect of the holiday parenting-time schedule on appellant's parenting-time percentage. He contends that the district court should have calculated his parenting-time percentage based on a two-year calendar that accounts for the alternating holiday schedule. The parenting-expense-adjustment statute provides that the percentage of parenting time should reflect "a calendar year," but it does not explain whether the

[7] There are 336 hours in a two-week period, and the record contains an affidavit from appellant indicating that the children are in daycare for 9 hours each weekday, which is 45 hours each week. Excluding those daycare hours, the children are in the care of the parties for 246 hours during every two-week period. Under the existing parenting-time schedule, appellant's share of those 246 hours is 44%. Moreover, his share would also remain below 45.1% if the children were in daycare for either 8 or 10 hours per day.

suggested calculation methods—such as the "overnights" method—should be applied to a full calendar year or whether it may be applied to a representative portion of the full year, such as the biweekly parenting schedule in the instant case. Minn. Stat. § 518.36, subd. 1(a). Minnesota caselaw has not specifically addressed this issue.[8]

The parties' holiday parenting-time schedule provides that in even-numbered years appellant has parenting time with the children for half of the prescribed holiday days, and in odd-numbered years appellant has parenting time with the children for the other half of those prescribed holidays. The dissolution decree provides that this holiday schedule "supersede[s] the parties' regular parenting-time schedule." Depending on how many holidays occur during, and thus supersede, appellant's regularly scheduled parenting time in a given year, the holiday schedule could cause either a net gain or a net loss of appellant's parenting time, thereby placing him above the 45.1% threshold in some years but not others.[9]

Although the parties' biweekly schedule, viewed alone, is not necessarily representative of a calendar year, a one- or two-year calendar that accounts for the parties' holiday schedule would not necessarily be more representative of a calendar

[8] Appellant relies on *Welsh v. Welsh*, 775 N.W.2d 364 (Minn. App. 2009), contending that Minnesota's parenting-expense-adjustment statute is based on Oregon law. But the *Welsh* case involved a different section of Minnesota's child-support statute that is not relevant here, and appellant provides no legal citation to support his claim that Oregon law either permits or requires the use of a two-year calendar.

[9] The two-year calendar that appellant provided to the district court illustrates this variation—appellant's calendar demonstrates that he had 47.1% of the parenting time in 2010, and 43.3% of the parenting time in 2011.

year.[10] Because of the year-to-year variation caused by the holiday schedule, appellant's parenting-time percentage in any given one- or two-year period will be slightly different, which could require the district court to modify appellant's child-support obligation on a yearly basis.

Perhaps a final comment is appropriate: Review of the record before us reflects motions and court appearances occurring in March, April, and October 2008, in August, November, and December 2009, and in December 2010. Many years remain before the two minor children here reach majority. Their best interest will unquestionably be served by future avoidance of litigation directed at revisiting the yoked issues of support and parenting time.

In sum, the district court did not abuse its broad discretion by calculating appellant's parenting-time percentage based on a representative biweekly parenting-time schedule rather than appellant's proposed two-year schedule or by concluding that the holiday schedule affords the parties no significant gain or loss of parenting time. Accordingly, even if appellant had not forfeited the issue of his parenting-time percentage, he would not be entitled to relief on this issue.

Affirmed.

[10] Moreover, appellant's two-year calendar contains errors, such as erroneously crediting himself with parenting time for the children's maternal grandfather's birthday.