STATE OF MINNESOTA
IN COURT OF APPEALS
A11-2272

In re the Marriage of: Ann Tracy Boehne, petitioner,
Respondent,

vs.

Brian Robert Boehne,
Appellant.

Filed November 19, 2012
Reversed and remanded
Larkin, Judge

Scott County District Court
File No. 1999-12056

Steven C. Pundt, Pundt Law Firm, Minneapolis, Minnesota (for respondent)

Carol M. Grant, Kurzman Grant Law Office, Minneapolis, Minnesota (for appellant)

Considered and decided by Larkin, Presiding Judge; Schellhas, Judge; and Collins, Judge.*

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

LARKIN, Judge

Appellant-father challenges the district court's denial of his motion to reduce his child-support obligation, and its two awards to respondent-mother of conduct-based

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

attorney fees. Because the record does not support the finding that father retired in a bad-faith attempt to avoid his child-support obligations, we reverse and remand the child-support question. Because the awards of attorney fees were based on unsupported findings in the child-support phase of the proceeding, we also reverse the awards of attorney fees.

FACTS

The September 2000 judgment dissolving the marriage of appellant-father Brian Boehne and respondent-mother Ann Boehne directed father to pay monthly child support of $1,184 for the couple's three minor children. In 2003, a child support magistrate (CSM) increased father's monthly support obligation to $1,685. In March 2011, mother moved to modify father's support obligation, and to compel father to produce discovery regarding his finances. Father did not produce discovery. He asked the CSM to continue the hearing because of a change in his circumstances. The CSM denied father's request, and heard mother's motion on May 20, 2011. At that hearing, mother submitted information she had received from the county suggesting that father's income had increased to $12,000 per month, which was $4,000 more than his monthly income at the time of the 2003 child-support determination, and asked that father's support obligation be increased. Father produced a recent pay stub at the hearing, indicating that his average gross monthly pay from employment was $11,680. Father also informed the CSM that he had just retired from his job as an air-traffic controller and that he was in the process of filing a motion to reduce his child-support obligation. Although father argued that his medical condition prevented him from continuing to work as an air-traffic controller,

father did not produce any evidence related to his retirement, his post-retirement income, or his medical condition. The CSM ruled that father's monthly income (from all sources) for purposes of calculating child support was $14,822, and set father's monthly child-support obligation at $2,136. Father did not appeal this order.

In July 2011, father moved the district court to reduce his support obligation "based on [his] substantially decreased income." At the hearing on his motion, father explained that he retired from his position as an air-traffic controller in May of 2011 because his medical condition, including sleep apnea, precluded him from safely performing his job. He asserted that his reduced income for purposes of calculating child support should be $5,383 per month, which was the amount he anticipated receiving from his pension. He also asserted that his child-support obligation should be reduced to $956 per month. Mother argued that father's retirement was voluntary and that the district court should attribute income to father based on father's pre-retirement income.

The district court ruled that father was voluntarily unemployed, that father was attempting to avoid his child-support obligations in bad faith, and that it was "appropriate to impute income [to him]." The district court then denied father's motion, leaving the CSM's most recent child-support order in effect. The district court also awarded conduct-based attorney fees to mother because father "unreasonably contributed to the length and expense of these proceedings by previously representing to the Court that the FAA would not allow him to be an air traffic controller." The district court reasoned that "making a motion based on false representations to the Court is an unreasonable use of the Court's resources and proceedings."

The district court later denied father's motion for amended findings of fact, stating that father's motion "simply reargues his interpretation of the evidence and presents no showing that the Court ignored, contradicted, or overlooked the evidence on the record." The district court explained that all of the disputed findings were supported by the evidence, denied father's motion to amend, and awarded additional conduct-based attorney fees to mother. Father appeals.

D E C I S I O N

I.

Father argues that the district court abused its discretion by denying his motion to modify child support. A district court has "broad discretion" to resolve motions to modify child-support obligations. *Putz v. Putz*, 645 N.W.2d 343, 347 (Minn. 2002). An appellate court will reverse a district court's order regarding modification of a support obligation if the appellate court concludes that the district court abused its discretion by resolving the matter in a manner that is against logic and the facts on record. *Id.*

A district court may modify a support order upon a showing of "substantially increased or decreased gross income of an obligor or obligee," which "makes the terms unreasonable and unfair." Minn. Stat. § 518A.39, subd. 2(a)(1) (2010). A substantial change in circumstances is presumed if "the gross income of an obligor or obligee has decreased by at least 20 percent through no fault or choice of the party." *Id.* at subd. 2(b)(5) (2010). A parent's gross income for purposes of setting child support includes "any form of periodic payment to an individual," as well as any "potential income under section 518A.32" of the parent. Minn. Stat. § 518A.29(a) (2010). Under section

518A.32, "[i]f a parent is voluntarily unemployed, underemployed, or employed on a less than full-time basis . . . child support *must* be calculated based on a determination of potential income." Minn. Stat. § 518A.32, subd. 1 (2010) (emphasis added); *see* Minn. Stat. § 645.44, subd. 15(a) (2010) (stating that "'[m]ust' is mandatory"). In addressing whether a parent is voluntarily unemployed or underemployed or employed on less than a full-time basis, a district court "rebuttably presume[s] that a parent can be gainfully employed on a full-time basis." Minn. Stat. § 518A.32, subd. 1.

A. Voluntary unemployment

The district court found that father's retirement was a bad-faith attempt to avoid his child-support obligation, meaning that father was voluntarily unemployed, and therefore concluded that it was "appropriate to impute income [to him]." *See Putz*, 645 N.W.2d at 351 (noting that, in addressing whether a parent was voluntarily unemployed or underemployed, the predecessor to Minn. Stat. § 518A.32 did not preclude the district court from considering "whether an obligor's unemployment or underemployment [was] in bad faith toward his or her support obligation"); *see generally Giesner v. Giesner*, 319 N.W.2d 718 (Minn. 1982) (addressing the process of imputing income to parents for purposes of child support and spousal maintenance before statutes addressed the question). Whether a parent is voluntarily unemployed for purposes of setting child support is a finding of fact, which appellate courts review for clear error. *Welsh v. Welsh*, 775 N.W.2d 364, 370 (Minn. App. 2009) (citing *Putz*, 645 N.W.2d at 352; Minn. R. Civ. P. 52.01). Appellate courts are not bound by findings of fact that are influenced by errors

of law, even if those findings are otherwise supported by the record. *Flynn v. Beisel*, 257 Minn. 531, 534, 102 N.W.2d 284, 288 (1960).

A parent is not "voluntarily unemployed" if the parent shows that "the unemployment . . . is because [he] is physically or mentally incapacitated[.]" Minn. Stat. § 518A.32, subd. 3(3) (2010). The district court's order denying father's motion to modify his support obligation acknowledges that father, at the hearing on mother's motion, testified that, because of his medical condition, he was "unable to be an air traffic control[ler]. The FAA will not allow me to be an FAA controller." And the record for father's motion includes the affidavit of a "Front Line Manager" of the Minneapolis Air Traffic Control Tower. That affidavit states that, at the time of father's retirement, father had "lost certification to perform his normal duties as an [air-traffic controller] due to his medical condition[,]" and that father had "exhausted all of his earned sick leave at the time of retirement and opted to take his retirement in good faith." Consistent with the manager's assertion that father had lost his medical certification to work as an air-traffic controller, the record also contains an April 25, 2011, "Report by Examining Physician." That report is a check-the-box form. Under "Recommendation," the form has a box checked stating: "Medical clearance decision deferred to Flight Surgeon. *Employee may not perform air traffic control duties.*" (Emphasis added).

In ruling that father's retirement was a bad-faith attempt to avoid his support obligations, the district court reasoned that the flight surgeon would conclusively resolve whether father was medically cleared to work as an air-traffic controller. Even though

father retired before seeing the flight surgeon, we conclude that retiring before seeing the flight surgeon is not sufficient to show that he retired in bad faith for three reasons.

First, on April 25, 2011, a physician ruled that father "may not perform air traffic control duties." Therefore, father was, as of that date, medically incapacitated and, under Minn. Stat. § 518A.32, subd. 3(3), he was not voluntarily unemployed. Second, the record suggests that if father did not retire and was later terminated for an inability to perform as an air-traffic controller, that termination might negatively impact his retirement benefits. Thus, because, after retirement, father would be paying support based on income from his pension, a failure by father to retire could negatively impact the children. Third, the affidavit of the Front Line Manager states that the FAA requires mandatory separation or retirement of air-traffic controllers at age 56, that the minimum requirements for retirement of air-traffic controllers allows retirement at any age if the retiree has 25 years of service, or after 20 years of service if the retiree is age 50. The affidavit also notes that, at the time of his retirement, father was age 53 and had 25 years of service, and therefore that father "was qualified for retirement under both provisions." *Cf.* Minn. Stat. § 518A.32. subd. 1 (stating that the statutory presumption that a parent can work "full time" means that it is presumed that the parent can work 40 hours a week except in industries, trades or professions "in which most employers due to custom, practice, or agreement, use a normal work week of more or less than 40 hours in a week").

Thus, this record indicates that father was medically precluded from performing his job, that an attempt by father to keep his job could jeopardize retirement benefits –

and hence his ability to pay support – and that, even without considering father's medical condition, father qualified for ordinary retirement from his job as an air-traffic controller. We cannot say that this record supports a finding that father's retirement was a bad-faith attempt to avoid his child-support obligations. Nor can we say that this record supports the finding that father provided "no evidence to support [his] contention" that the "FAA would not allow him to be an air traffic controller."

In denying father's motion for amended findings, the district court also stated that the April 25, 2011, report of the examining physician "did not make a medical clearance decision; instead, it deferred the matter to the Flight Surgeon" and that "there is no evidence to show the Court's interpretation [of the report to defer this decision to the flight surgeon] is incorrect." Three aspects of the record suggest otherwise. First, the statement in the affidavit of the manager at the Minneapolis Air Traffic Control Tower that father had "lost certification to perform his normal duties as an [air-traffic controller] due to his medical condition" is uncontradicted. Second, the district court acknowledged father's testimony at the hearing on mother's motion that he (father) had lost his medical clearance and was "unable to be an air traffic control[ler.]" Third, while not dispositively addressing father's medical clearance to act as an air-traffic controller, the record also contains a June 30, 2011 letter from a medical doctor at the Minnesota Sleep Institute, detailing father's unsuccessful attempts to deal with his sleep apnea. It notes that since 2003, father has engaged in therapy, used an oral appliance, and even had surgery. The physician reports that father is persistently fatigued, that father's fatigue is exacerbated by depression, and that father is under treatment with another physician for his

depression. The physician concluded his letter by stating: "In my opinion[, father] should not continue to work as an [air-traffic controller] under these conditions."

We acknowledge that the district court discredited the opinion expressed in the letter because, per the district court, that opinion appeared "to be based on information gathered from [father] during the month of June [2011]," the month after father retired. We also acknowledge that appellate courts generally defer to district court credibility determinations. *Cf. Straus v. Straus*, 254 Minn. 234, 235, 94 N.W.2d 679, 680 (1959) (noting that appellate courts defer to a district court's resolution of factual issues presented by conflicting affidavits); *Hestekin v. Hestekin*, 587 N.W.2d 308, 310 (Minn. App. 1998) (citing this aspect of *Straus*). Here, the district court's discrediting of the opinion of the physician at the Minnesota Sleep Institute seems to be based on a reading of the letter to state that the information on which the physician's opinion was based was, like the letter, generated after father retired. Were this the case we would undoubtedly defer to the district court's credibility determination regarding the letter. We read the letter differently, however. We read the letter, and particularly its references to father's treatment history, to indicate that the information on which the physician's opinions were based was generated during father's entire course of treatment at the Minnesota Sleep Institute, a period dating back to September 23, 2003. Therefore, while the *letter* is dated more than a month after father retired, we cannot say that the information which formed the basis for the physician's opinion that father "should not continue to work as an [air-traffic controller]" was of a similar post-retirement vintage. Because we believe that the district court's discrediting of the letter is based on a misapprehension of the underlying

facts, we, in this unusual circumstance, are not persuaded that the letter must be disregarded.

Moreover, on appeal, mother's argument is singularly focused on whether father retired "voluntarily" under Minn. Stat. § 518A.39, subd. 2(b)(5). Under this statute, "[i]t is presumed that there has been a substantial change in circumstances" and the terms of an existing support order are "rebuttably presumed to be unreasonable and unfair if" the obligor's gross income has decreased by "at least 20 percent through no fault or choice of the party." Minn. Stat. § 518A.39, subd. 2(b)(5). Mother reads this statute to mean that father cannot obtain a reduction in his support obligation because his choice to retire precludes him from showing that his income decreased through no fault or choice of his own.

Mother misreads the statute. The statute creates a presumption that there has been a substantial change in circumstances and a separate rebuttable presumption that an existing support obligation is unreasonable and unfair if any of six sets of circumstances are present. *See* Minn. Stat. § 518A.39, subd. 2(b)(1)-(6) (listing circumstances generating the presumptions). The failure to satisfy one of the circumstances generating the presumptions, however, does not preclude the party from generating the presumptions by satisfying one or more of the other circumstances listed in the statute. Further, under caselaw, a district court may modify a support obligation even if a presumption no longer exists. *See O'Donnell v. O'Donnell*, 678 N.W.2d 471, 477 (Minn. App. 2004) (stating that under the predecessor statute generating similar presumptions, if certain circumstances were met, because the presumptions in that case were rebutted, "the

propriety of modifying support must [ ] be determined based on whether there has actually been a substantial change in circumstances rendering the existing support obligation unreasonable and unfair"). Therefore, we reject mother's argument that a failure to satisfy the circumstance listed in Minn. Stat. § 518A.39, subd. 2(b)(5) precludes modification of a support obligation.

In summary, we conclude that this record does not support findings that father retired in a bad-faith attempt to finesse his child-support obligation and that he was therefore voluntarily unemployed under Minn. Stat. § 518A.32, subd. 1. We also reject mother's argument that a moving party's failure to satisfy one of the circumstances that would generate the presumptions favoring modification precludes modification.

B. Father's income

The record shows that the support obligation father moved to modify was based on his pre-retirement income as an air-traffic controller. The district court, based on its finding that father's retirement was in bad faith and meant that he was voluntarily unemployed, left father's existing support obligation in place despite the facts that father had retired and had experienced an associated decrease in his actual income. The district court, therefore, functionally attributed to father potential income in an amount equal to the difference between father's actual post-retirement income and the amount he had earned as an air-traffic controller. Our reversal of the finding that father retired in bad faith, however, removes the basis for attributing potential income to father based on his income as an air-traffic controller. Therefore, we remand the question of father's income for purposes of child support.

Regarding the remand, we note that our reversal of the finding that father retired in bad faith precludes attributing potential income to father based on his income as an air-traffic controller; it does not preclude attributing potential income to father based on some other amount if the district court finds – and adequately explains – that father is, in fact, voluntarily unemployed or underemployed or employed on less than a full-time basis under Minn. Stat. § 518A.32 for a reason other than his retirement from his position as an air-traffic controller. If the district court finds father to be voluntarily unemployed, underemployed, or employed on less than a full time basis under Minn. Stat. § 518A.32, the district court must (a) identify which of the three methods of attributing potential income listed in Minn. Stat. § 518A.32, subd. 2 it will apply to father; (b) explain why it selected that method of attributing potential income to father; and (c) explain how it determined the amount of potential income it attributes to father. Further, the date as of which any potential income is attributed to father shall be a date that allows father a reasonable amount of time after his retirement to secure whatever income the district court is attributing to him. And the retroactivity of any modification of father's support obligation is governed by Minn. Stat. § 518A.39, subd. 2(e) (2010).

Additionally, we note that our discussion of the possibility that, on remand, the district court will find it appropriate under Minn. Stat. § 518A.32 to attribute potential income to father because he is voluntarily unemployed, underemployed, or employed on less than a full-time basis is not a requirement that the district court find that father is voluntarily unemployed, underemployed, or employed on less than a full-time basis. The district court retains full discretion to resolve the remanded matters in whatever manner it

believes appropriate on the facts of this case and under the relevant authorities. Finally, whether to reopen the record on remand shall be discretionary with the district court.

II.

A district court may award conduct-based attorney fees "against a party who unreasonably contributes to the length or expense of the proceeding." Minn. Stat. § 518.14, subd. 1 (2010). Here, the district court awarded mother attorney fees based on what it found to be father's bad-faith attempt to avoid child-support obligations and on what it found to be father's purportedly "false representations to the Court" of his inability to work as an air-traffic controller. Specifically, the district court found that father "unreasonably contributed to the length and expense of these proceedings by previously representing to the Court that the FAA would not allow him to be an air traffic controller[,]" and because, in his motion for amended findings, father continued to make this representation to the court "even though he had no evidence to support this contention." Father challenges these awards.

"An award of conduct-based attorney fees is reviewed for an abuse of discretion." *Brodsky v. Brodsky*, 733 N.W.2d 471, 476 (Minn. App. 2007). As discussed above, the finding that father failed to provide evidence to support his assertion that the FAA would not allow him to work as an air-traffic controller is not supported by this record. Therefore, we reverse the award of attorney fees based on that finding. We also reverse the award of fees related to father's motion for amended findings because the district court awarded those fees "[f]or the same reasons" as its first award of attorney fees.

Reversed and remanded.