STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0826

Jonathan P. Mogck, petitioner,
Respondent,

vs.

Barbara L. Mogck, n/k/a Barbara Bandy-Alms,
Appellant.

Filed July 22, 2013
Affirmed as modified
Rodenberg, Judge

Hennepin County District Court
File No. 27-FA-000294301

Marc A. Johannsen, Kay Nord Hunt, Lommen, Abdo, Cole, King & Stageberg, P.A., Minneapolis, Minnesota (for respondent)

Sharon Herland Ysebaert, Eastlund, Solstad, Cade & Hutchinson, Savage, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Stoneburner, Judge; and Rodenberg, Judge.

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

RODENBERG, Judge

On appeal in this child-support- and spousal-maintenance-modification dispute, appellant-mother argues that the district court (1) should have applied the doctrine of collateral estoppel to preclude relitigation of the child-support and spousal-maintenance

modification to the extent that respondent-father's current motion was based on issues decided in his prior motion; (2) misread the underlying support award, thereby misidentifying the baseline circumstances against which claims of substantially changed circumstances should properly be measured; and, (3) should not have allowed the failure to achieve certain circumstances expected by the parties to satisfy the requirement of substantially changed circumstances. We affirm as modified.

FACTS

Appellant Barbara Mogck n/k/a Barbara Bandy-Alms and respondent Jonathan Mogck were married in 1981. The parties separated in 2002, and the marriage was dissolved by judgment and decree entered July 19, 2005. Bandy-Alms and Mogck have four children together. One of the children, born October 6, 1995, was a minor at the time the marriage was dissolved.

At the time the judgment and decree was entered, Mogck was employed by Compass Marketing. The judgment and decree provided that Mogck was earning at least $240,000 annually and that his monthly living expenses were $6,578. Bandy-Alms was not employed outside the home at the time, and the monthly living expenses of Bandy-Alms and the minor child were $8,080. The parties had debt totaling $145,859. Of that debt, Mogck was assigned responsibility for $83,173, and Bandy-Alms was assigned responsibility for $55,380. The remainder was to be paid out of a joint escrow account. The parties were granted joint legal custody of the minor child and Bandy-Alms was granted sole physical custody. Mogck was ordered to pay $1,997 per month in child support and $6,000 per month in permanent spousal maintenance. By agreement

incorporated into the judgment and decree, Mogck could seek modification of his child-support and spousal-maintenance obligations only if his earnings amounted to less than $200,000.

In October 2007, Mogck voluntarily left his job with Compass due to the economic downturn. In 2007, Mogck earned $510,832. In 2008, Mogck was self-employed and earned $106,786. In 2009, Mogck unilaterally reduced his child-support and spousal-maintenance payments and accumulated $64,127 in arrearages.

In June 2009, Mogck moved the district court to modify his child support and spousal maintenance, claiming he was entitled to a modification based on changed circumstances due to a substantial decrease in income. In an order dated November 2009, the district court denied Mogck's motion, finding that his decision to leave Compass was in bad faith, that he failed to show that he was making sufficient efforts to obtain a higher paying job to meet his obligation, and that he needed to further reduce his monthly expenses before requesting a reduction in his support obligations.

Mogck appealed. In July 2010, during the pendency of the appeal, the parties entered into a stipulated agreement and the appeal was dismissed. The stipulation required Mogck to, among other things, pay Bandy-Alms

- $500 per month in child support and pay no spousal maintenance from January 1, 2010, through March 2010;

- $600 per month for child support and $600 per month for spousal maintenance from April 1, 2010, through May 2010;

- $1,000 per month in child support and $1,500 per month in spousal maintenance from June 1, 2010, through July 2010;

- $1,500 per month in child support and $2,000 per month in spousal maintenance from August 1 2010, through December 2010;

- $1,500 per month in child support and $2,250 in spousal maintenance from January 1, 2011, through June 2014.

The parties also stipulated that there would be a de novo review of spousal maintenance in July 2014. During the review, there was to be a rebuttable presumption that Mogck was earning $100,000 per year. The stipulation made no reference to what the parties considered to be Mogck's baseline income and noted that "[a]ll other provisions in the underlying dissolution [judgment and decree] remain in full force and effect."

Mogck failed to meet his child-support and spousal-maintenance obligations under the stipulation. As a result, in June 2011 Bandy-Alms requested that the district court hold him in contempt. In her supporting affidavit, Bandy-Alms stated that she did not believe that Mogck "has made good faith efforts to find employment and meet his financial obligations to his daughter and me," and that she believed Mogck was "forgoing job opportunities that pay as much as $70,000 per year."

In Mogck's responsive affidavit, he denied that he had turned down any employment opportunities and denied that he had not made a good-faith effort to meet his financial obligations to Bandy-Alms and their minor child. Mogck argued that the spousal maintenance and child support agreed upon in 2010 was based on an expectation of his earning $100,000 annually. He averred that he "is not likely to be in the position to consistently make enough income to achieve that level of payment for at least a minimum of 6 months to one year." Mogck asserted that his monthly expenses had been reduced

and that he was working hard to meet his obligations. Mogck explained that he had established a contract to earn $2,500 per month with a company called Tirta Marta USA (TM) and that as of July 2011 he had made $5,000 with that contract and had paid Bandy-Alms over $6,000. The district court scheduled an evidentiary hearing on the contempt motion to be held on January 5, 2012.

On December 19, 2011, Mogck moved to modify his child-support obligation and suspend his spousal-maintenance obligation. In his supporting affidavit, Mogck averred that there had been "a substantial change in circumstances that make the prior [stipulated] order in this matter entered July 19, 2010 unreasonable and unfair." He explained that, at the time of the stipulation, he had estimated that he would be earning $100,000 annually between his work at his own consulting company, Frontend, LLC, and at TM, a new business that was not even incorporated until October 2010. Mogck stated that "[b]y [the] third quarter 2010 it became clear that [TM] was the best option for me to earn a living" and that he had hoped the company would "take off sooner" but that there had been "limited success in generating income thus far" even though he had been working over 60 hours per week since incorporation.

Mogck also explained that, despite his efforts, Frontend's net income in 2009 was $14,176, in 2010 was $1,865, and in 2011 was $0. He explained the efforts he had made to develop business first at Frontend and now at TM, and to gain full-time employment. Mogck submitted his 1040 tax forms for 2009 and 2010, which reflected adjusted gross incomes of $50,171 and $76,425 respectively. Mogck further explained that his current wife was now paying most of the couple's necessary monthly expenses and that he had

further cut his own living expenses to $2,210, not including that which he had been able to pay to Bandy-Alms or toward his debt. Finally, Mogck explained that he was $258,000 in debt stemming from the original judgment and decree, attorney fees, the short sale of his house, business debt, and personal debt.

In her responsive affidavit, Bandy-Alms stated that since Mogck's first modification motion in August 2009 he "has done nothing different than he did [then] and that is to pursue his own business opportunities." She argued that his continued lack of success in generating sufficient income is not a significant change in circumstances. She argued that she is experiencing financial hardships and that Mogck should not be "rewarded" with a modification as a result of his own choice to leave Compass to pursue other business opportunities.

At the January motion hearing, Mogck testified concerning the evolution of his finances and explained that in 2010 his gross compensation from Frontend was $18,989 and that the same year he paid Bandy-Alms $31,414 from money withdrawn by his current wife from her 401(k) plan. Mogck testified that he ended his efforts with Frontend in September 2011, that he now owned 51% of TM, that he had been paid approximately $18,000 in 2011 from his work with TM, and that from that compensation he had paid Bandy-Alms $13,967. Mogck believed there would be enough activity with TM in 2012 to allow him to take home between $40,000 and $50,000.

Ultimately, Mogck argued that the 2010 stipulation was based on the assumption that he was going to make $100,000, and that because that assumption turned out to be erroneous despite his best efforts, the stipulation was unfair and unreasonable. He

emphasized that he has paid "all of [his] income" to Bandy-Alms and requested a temporary reduction to reflect the current circumstances. Bandy-Alms did not testify and argued that there had been no change from Mogck's last motion to modify in 2009 and that Mogck's attempts at finding full-time employment were not reasonable.

In an order filed March 15, 2012, the district court denied Bandy-Alms's contempt motion, suspended Mogck's spousal-maintenance obligation, and reduced Mogck's child-support obligation to $480 per month. The district court found that Mogck's attempts to grow the TM business in order to meet his obligations were in good faith and that there was insufficient evidence to find that Mogck had willfully disobeyed the stipulation. Relying on Minn. Stat. §§ 518A.35 and .39, subd. 2(b)(1) (2010), the district court found that Mogck had demonstrated a substantial change in circumstances that rendered his previous support obligation unreasonable and unfair. In so doing, it imputed a $40,000 gross annual income to Mogck retroactive to the date of service of his motion to modify.

The district court ordered the parties to appear for a six-month review hearing on June 21, 2012. Bandy-Alms filed this appeal on May 10, 2012.

D E C I S I O N

I.

We review a district court's decision addressing a modification motion for an abuse of discretion. *Dobrin v. Dobrin*, 569 N.W.2d 199, 202 (Minn. 1997). The district court abuses its discretion when it resolves the matter in a manner that is "against logic and the facts on [the] record." *Rutten v. Rutten*, 347 N.W.2d 47, 50 (Minn. 1984). A party seeking to modify spousal maintenance must establish both a substantial change in

circumstances and that the changed circumstance renders the existing spousal-maintenance award unreasonable and unfair. Minn. Stat. § 518A.39, subd. 2(a); *see Hecker v. Hecker*, 568 N.W.2d 705, 709 (Minn. 1997) (addressing modification of maintenance).

A. Substantial Change in Circumstances

Where, as here, an existing maintenance award is based on a stipulated order, the stipulated nature of that order "represents the parties' voluntary acquiescence in an equitable settlement," but "it does not operate as a bar to later consideration of whether a change in circumstances warrants a modification." *Hecker*, 568 N.W.2d at 709. In the maintenance-modification context, the "relevance" of a stipulated judgment "is in the identification of the baseline circumstances against which claims of substantial change are evaluated." *Id*.

A substantial decrease in earnings may constitute a change in circumstances. Minn. Stat. § 518A.39, subd. 2(a)(1). The frustration of the parties' expectations on which a stipulation was based can satisfy the substantial-change-in-circumstances prong of the modification analysis. *Hecker*, 568 N.W.2d at 709; *see Kemp v. Kemp*, 608 N.W.2d 916, 921 (Minn. App. 2000) (noting that an unanticipated change in circumstances can be relevant to whether to modify stipulated spousal-maintenance award).

Bandy-Alms argues that the district court erred by using $200,000 as a baseline against which to measure whether Mogck's current $40,000 imputed income represents a change in circumstances sufficient to justify a modification. She asserts that the baseline

should instead be what Mogck was *actually* earning at the time the stipulation was entered into—an amount significantly less than $200,000 per year.[1] We are not persuaded.

While the 2010 stipulation did not specifically identify a baseline income for Mogck, the record strongly indicates that the stipulation was not premised on what Mogck was earning at that time. Instead, it appears that the stipulation was based, at a minimum, on the parties' assumption that Mogck would be earning at least $100,000 per year: the stipulation not only references the judgment and decree's imputation of a $200,000 annual salary on Mogck for purposes of future modifications, but it also provides a rebuttable presumption operative upon review of spousal maintenance in 2014 that Mogck is capable of earning $100,000 per year. We cannot conclude that the parties considered Mogck's 2010 income as the baseline for the stipulation, as doing so would mean Mogck agreed to pay child support and spousal maintenance in an amount in excess of 75% of his income.[2]

Because the stipulation was not based on Mogck's actual income at the time, the district court properly declined to rely on his actual 2009 income when evaluating whether he established substantially changed circumstances in 2012. *See Maschoff v. Leiding*, 696 N.W.2d 834, 840-41 (Minn. App. 2005) (explaining that the importance of baselines in stipulations is not to reflect actual income at the time of a judgment or

[1] Mogck's gross income in 2009 was $50,171. The order denying Mogck's modification motion was entered in November 2009. Mogck immediately appealed the 2009 order, and the stipulation that resulted from the appeal was entered in July 2010.

[2] $45,000 per year ($3,750 per month in spousal maintenance and child support).

stipulation, but instead to provide future courts a way to determine, via comparison, whether changed circumstances exist when a motion for modification has been made). Therefore, Bandy-Alms has failed to establish that the district court abused its discretion. On appeal, error is never assumed, and the party asserting the error has the burden of showing it before there can be a reversal. *Loth v. Loth*, 227 Minn. 387, 392, 35 N.W.2d 542, 546 (1949).

Additionally, Bandy-Alms argues that the district court erred when it considered frustration of Mogck's income expectations to support a finding of changed circumstances. But the record clearly establishes that, in the years following the stipulation, Mogck did not make the $100,000 per year that the parties considered that he would be able to earn when they entered the 2010 stipulation. This was so despite his best, good-faith efforts, the district court having credited Mogck's testimony that his efforts to meet his obligations have been in good faith. To the extent the district court relied on frustration of the parties' expectations as a basis for changed circumstances, doing so was a proper basis for finding significantly changed circumstances. *See Rydell v. Rydell*, 310 N.W.2d 112, 114–15 (Minn. 1981) (finding changed circumstances when the parties' assumption that the wife's physical condition would improve and thus decrease her medical expenses if she moved to Arizona failed to prove true; contrary to expectations, her health deteriorated and a modification in maintenance was thereby justified).

Bandy-Alms argues that the doctrine of collateral estoppel precludes relitigation of issues previously presented to and decided by the district court when it denied Mogck's

2009 motion for modification. Therefore, she argues, the district court abused its discretion when it considered and made findings of changed circumstances based on Mogck's "subjective intent" and his debts in existence in 2009. We disagree.

Collateral estoppel is an affirmative defense that precludes parties to an action from relitigating in subsequent actions issues that were determined in the prior action. *Tarutis v. Comm'r of Revenue*, 393 N.W.2d 667, 669 (Minn. 1986). "Once the reviewing court determines that collateral estoppel is available, the decision to apply collateral estoppel is left to the district court's discretion." *In re Estate of Perrin*, 796 N.W.2d 175, 179 (Minn. App. 2011) (quotation omitted). Collateral estoppel has limited application in family-law matters. *Maschoff*, 696 N.W.2d at 838. Maintenance rulings are not the traditional "final judgments" that the doctrine of collateral estoppel protects. *Id*. This is so because, absent an enforceable waiver, district courts have "continuing jurisdiction over dissolution proceedings" and can modify custody, parenting time, and spousal maintenance. *Loo v. Loo*, 520 N.W.2d 740, 743 (Minn. 1994).

We note that Bandy-Alms did not make any collateral-estoppel argument to the district court, and this court generally declines to consider matters not presented to or considered by the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (providing that an appellate court will generally decline to consider matters not argued to or considered by the district court).

In the proceedings at issue in this appeal, the district court properly considered only whether circumstances had sufficiently changed since the stipulation was entered in 2010. The district court found that, following entry of the stipulation, Mogck was

making a good-faith effort to grow TM so that he could meet his obligations. This is not the same issue addressed by the district court in 2009. The issue in 2009 was whether Mogck had left Compass in good faith. The district court did not rule on identical issues based on identical facts in 2009 and in 2012. The doctrine of collateral estoppel does not apply here. *See Hauschildt v. Beckingham*, 686 N.W.2d 829, 837 (Minn. 2004) (providing that collateral estoppel applies when "the *issue* [is] *identical* to one in a prior adjudication" (emphasis added)).

B. Unreasonable and Unfair

The district court did not, as Bandy-Alms asserts, abuse its discretion when it concluded that the change in Mogck's circumstances rendered the 2010 stipulation unfair. While the stipulation provided for gradually increasing child-support and spousal-maintenance obligations, it ultimately required Mogck to pay $45,000 in child support and spousal maintenance per year. This obligation is more than Mogck's $40,000 imputed income and would therefore be an impossible burden.

Additionally, the district court found that Mogck's efforts toward making TM a successful business in order to meet his obligations have been in good faith. This is a determination to which we give deference. *See Eisenschenck v. Eisenschenk*, 668 N.W.2d 235, 241 (Minn. App. 2003) (providing that whether a party acts in good faith is a question on which appellate courts defer to the district court), *review denied* (Minn. Nov. 25, 2003). Where an obligor has experienced a substantial decrease in income after a career change, if the district court finds that the change was made in good faith "so that [the obligor] might meet his obligations, including his support and maintenance

obligations," the district court may then modify or temporarily suspend a child-support or spousal-maintenance obligation without abusing its discretion. *Giesner v. Giesner*, 319 N.W.2d 718, 718–20 (Minn. 1982).

Bandy-Alms attempts to distinguish *Giesner* by emphasizing that the obligor in that case was fired from his employment. But an inquiry into why Mogck left Compass does exactly what Bandy-Alms argues is not proper—it focuses on facts and findings that informed the 2009 order denying a modification. The district court's 2012 intent finding properly focused on Mogck's efforts with TM after the stipulation was entered, rather than on what happened with Compass. While a district court has the discretion to consider whether an obligor was fired or voluntarily left a job when evaluating that obligor's intent toward meeting obligations, there is nothing in *Giesner* or its progeny indicating that whether someone quit work is dispositive of the intent issue. A party can certainly change employment in good faith, as was the case here. *Cf. Juelfs v. Juelfs*, 359 N.W.2d 667, 670 (Minn. App. 1984) (holding that obligor-father was not entitled to reduced child-support payments where he lacked good faith when he voluntarily quit his longstanding employment to develop a business and was fully aware the business was inadequate to meet his needs and obligations), *review denied* (Minn. Mar. 29, 1985). So long as the "change [in employment] was made in good faith, the child and the separated spouse should share in the hardship as they would have had the family remained together." *Giesner*, 319 N.W.2d at 720.

II.

The district court has broad discretion when deciding child-support-modification issues. *Moylan v. Moylan*, 384 N.W.2d 859, 864 (Minn. 1986). A child-support order may be modified upon a showing of a substantial change in circumstances, such as substantially increased or decreased gross income, which makes the existing order unreasonable and unfair. Minn. Stat. § 518A.39, subd. 2(a)(1). If application of the child-support guidelines results in a calculated order that is at least 20% and $75 per month higher or lower than the current child-support order, there is a presumption that there has been a substantial change in circumstances and there is an additional, rebuttable presumption that the existing support obligation is unreasonable and unfair. *Id.*, subd. 2(b)(1). The district court applied this formula and determined that a substantial change had occurred since the stipulated order and that the stipulated child-support amount was therefore unreasonable and unfair.

Bandy-Alms presents little, if any, argument for reversal of the district court's child-support modification. Issues not briefed on appeal are waived. *Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982); *see also State v. Modern Recycling, Inc.*, 558 N.W.2d 770, 772 (Minn. App. 1997) (explaining that 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). Bandy-Alms's initial brief does not address the presumptions established by Minn. Stat. § 518A.39, subd. 2(b)(1); nor does she attempt to rebut the presumption that the child support required by the stipulation is now unreasonable and unfair. And to the extent that Bandy-Alms raised any argument

relating to this issue in her reply brief, we decline to address it. Issues not raised or argued in appellant's brief cannot be revived in a reply brief.[3] *McIntire v. State*, 458 N.W.2d 714, 717 n.2 (Minn. App. 1990), *review denied* (Minn. Sept. 28, 1990). The district court's decision to modify child support was not an abuse of discretion.

Nevertheless, as an error-correcting court, our function is to identify and correct errors. *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. App. 1988). We must, therefore, modify the child-support-obligation amount because the district court improperly computed the amount. As Mogck's counsel has commendably acknowledged, the district court erroneously included a non-joint child in its child-support calculation, resulting in a deduction of $318 from Mogck's monthly support obligation. Correctly calculated, Mogck's child-support obligation should be $519 per month. We, therefore, affirm the district court's decision to modify child support but conclude that the obligation should be modified to $519 per month.

Affirmed as modified.

[3] Even if we were to consider the arguments on this issue raised in Bandy-Alms's reply brief, the authority on which she relies to support her argument is inapplicable and misplaced. *Putz v. Putz*, 645 N.W.2d 343 (Minn. 2002), is a child-support-modification matter dealing with voluntary unemployment that was remanded because the district court failed to make certain findings. Additionally, *Mower Cnty. Human Servs. ex rel. Swancutt v. Swancutt*, 551 N.W.2d 219 (Minn. 1996), involves an obligor whose change in employment and income was found by the district court to be in bad faith.