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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1950**

In re the Marriage of:
Kelley K. Botts, petitioner,
Respondent,

vs.

Joseph Patrick Wagner,
Appellant.

**Filed September 2, 2008
Reversed and remanded
Klaphake, Judge**

Hennepin County District Court
File No. 27-FA-000272130

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Manual Guzman, Assistant County Attorney, Family Law Center, 110 South Fourth Street, Minneapolis, MN 55401 (for respondent Hennepin County Support and Collections)

Shane C. Perry, Perry, Perry & Perry, Parkdale 1, Suite 270, 5401 Gamble Drive, Minneapolis, MN 55416 (for appellant)

Considered and decided by Klaphake, Presiding Judge; Peterson, Judge; and Worke, Judge.

UNPUBLISHED OPINION

KLAPHAKE, Judge

On appeal from the denial of appellant's motion to modify his child support obligation, appellant argues that the district court (1) made findings of fact and conclusions of law that are not supported by the record; (2) erred in denying his motion to be awarded the tax dependency exemptions; and (3) abused its discretion in awarding respondent attorney fees. We reverse and remand.

DECISION

Motion to Modify Child Support

Appellant argues that the district court abused its discretion in denying his motion to modify his child support obligation because the findings of fact and conclusions of law are not supported by the record. The district court has discretion to modify support, and its decision will not be altered on appeal unless the matter was resolved in a manner that is against logic and the facts on record. *Putz v. Putz*, 645 N.W.2d 343, 347 (Minn. 2002); *Moylan v. Moylan*, 384 N.W.2d 859, 864 (Minn. 1986). The district court also abuses its discretion by misapplying relevant law. *Ver Kuilen v. Ver Kuilen*, 578 N.W.2d 790, 792 (Minn. App. 1998).

Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the [district] court to judge the credibility of the witnesses. The findings of a referee, to the extent adopted by the court, shall be considered as the findings of the court.

Minn. R. Civ. P. 52.01. It is not the province of this court “to reconcile conflicting evidence. On appeal, a [district] court’s findings of fact are given great deference, and shall not be set aside unless clearly erroneous If there is reasonable evidence to support the [district] court’s findings of fact,” we will not disturb those findings. *Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 101 (Minn. 1999) (citation omitted).

In denying his motion to modify child support, appellant argues that the district court erroneously found that he quit a year-round job as a crane operator to work seasonally. We agree. The record shows that appellant has been employed in seasonal construction business since 1979, which includes his crane operator job. Further, the record shows that there was a question as to whether work would have been available to appellant even if he had renewed his crane operator’s license. Based on this record, the finding that appellant quit a year-round job as a crane operator in favor of seasonal work is clearly erroneous. We therefore reverse the district court’s denial of appellant’s motion to modify his support obligation and remand for further proceedings. On remand, the district court must reopen the record for further evidence of the parties’ current financial circumstances.

Tax Dependency Exemptions

Appellant also argues that the district court abused its discretion in denying his motion to be awarded the income tax dependency exemptions. Modification of the allocation of the income tax dependency exemption is analogous to modifying child support and must be done in accordance with Minn. Stat. § 518A.39, subd. 2 (2006). *Biscoe v. Biscoe*, 443 N.W.2d 221, 224 (Minn. App. 1989); *Joneja v. Joneja*, 422 N.W.2d

306, 310 (Minn. App. 1988). A district court abuses its discretion if it resolves the matter in a manner “that is against logic and the facts on the record.” *Moylan*, 384 N.W.2d at 864 (quotation omitted).

Based on the parties’ stipulation, the income tax dependency exemptions were awarded to respondent. In response to appellant’s motion to be awarded the exemptions, the district court found that the record did not require or justify a change in the stipulated status of the tax exemptions. However, respondent acknowledged that she is currently not earning enough income to benefit from the tax exemptions. Shifting the exemptions to appellant may benefit both parties. On remand, the district court shall review the parties’ current financial circumstances and determine whether there has been a substantial change in circumstances that renders the prior order concerning the tax exemptions unreasonable and unfair. *See* Minn. Stat. § 518A.39, subd. 2.

Attorney Fees

Appellant also argues that the district court abused its discretion in awarding respondent \$2,500 in need-based attorney fees. A district court *shall* award need-based attorney fees if it finds that (1) the fees are necessary for a good faith assertion of a party’s rights; (2) the party from whom fees are sought has the means to pay them; and (3) the party to whom fees are awarded does not have the means to pay them. Minn. Stat. § 518.14, subd. 1(1)-(3) (2006). A district court may also, “in its discretion,” award attorney “fees, costs, and disbursements against a party who unreasonably contributes to the length or expense of the proceeding.” *Id.* Because different statutory considerations govern the award of need-based versus conduct-based attorney fees, the district court

must indicate whether the fee award is based on conduct or need and address the statutory factors for the kind of award involved. *Geske*, 624 N.W.2d at 816.

The district court failed to address whether the attorney fee award was based on need or conduct. The district court found that respondent did not have the means to pay her attorney fees, but did not find that the fees were necessary for a good faith assertion of respondent's rights. Even if this finding can be inferred from the record, the district court found that appellant—the party from whom fees are being sought—did *not* have the means to pay them. Therefore, if the district court's fee award is an award of need-based fees, that award is not supported by the required findings. Alternatively, while the district court found that respondent's attorney fees were caused in part by appellant, there is no finding that appellant “unreasonably contribute[d] to the length or expense of the proceeding.” Minn. Stat. § 518.14, subd. 1. Therefore, the district court's findings also do not support a conduct-based award of attorney fees. Because the district court abused its discretion in failing to address whether the attorney fee award was need- or conduct-based and did not provide findings indicating the basis for the decision, we reverse and remand the award for further consideration.

Reversed and remanded.