STATE OF MINNESOTA
IN COURT OF APPEALS
A15-2064

In re the Marriage of:
Heather Lee Burke, petitioner,
Respondent,

vs.

Thomas Joseph Burke,
Appellant,

County of Otter Tail, intervenor,
Respondent.

Filed March 6, 2017
Affirmed
Bjorkman, Judge

Otter Tail County District Court
File No. 56-FA-14-292

Paul B. Hunt, Karkela, Hunt & Cheshire, PLLP, Perham, Minnesota (for respondent Heather Lee Burke)

Thomas Burke, Ottertail, Minnesota (pro se appellant)

David Hauser, Otter Tail County Attorney, Danielle Marie Baan Hofman, Assistant County Attorney, Fergus Falls, Minnesota (for respondent County of Otter Tail)

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

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

BJORKMAN, Judge

Appellant challenges various aspects of the judgment dissolving his marriage, arguing it does not accurately reflect the parties' mediated settlement agreement (MSA) and that the district court erred in determining his income for child-support purposes, awarding wife conduct-based attorney fees, and appointing a custody evaluator at the parties' expense. We affirm.

FACTS

Appellant-husband Thomas Joseph Burke and respondent-wife Heather Lee Burke were married in 2006, and have three minor children. In February 2014, wife commenced this action. On July 24, wife filed a motion requesting temporary child support. Because the children received medical-assistance benefits, the district court referred wife's request to the expedited child-support process.[1] Following an evidentiary hearing, the child-support magistrate ordered husband to pay $791 per month in basic child support and $99 per month for insurance. Husband requested judicial review of the temporary order; the district court declined to lower the child-support payment.

On April 21, 2015, the parties executed the MSA, which established a parenting-time schedule, divided the parties' real and personal property, and provided that neither party was entitled to spousal maintenance. On April 29, wife's counsel sent husband a proposed stipulated dissolution judgment. Husband responded that the proposed judgment

[1] Husband's attorney withdrew approximately one week before the child-support hearing. Husband subsequently represented himself.

was inconsistent with the MSA and demanded that the judgment be amended. Husband submitted proposed changes to wife's counsel, who incorporated them into a new proposed stipulated judgment. Husband again refused to sign the document, asserting that it was inconsistent with the MSA.

On June 19, wife filed a motion to enforce the binding MSA through the proposed judgment and for an award of attorney fees based on husband's failure to comply with the MSA. Husband responded by asking the district court to enforce the MSA without changing it, deny wife's request for attorney fees, and order wife to disclose her assets and work schedule. On October 13, the district court granted wife's motion, awarding her $1,335 in conduct-based attorney fees. The district court determined wife's proposed dissolution judgment was consistent with the MSA and that husband had unreasonably contributed to the length and cost of the proceeding. That same day, the district court issued its findings of fact, conclusions of law, and entered judgment dissolving the marriage. Husband appeals.

D E C I S I O N

I. The dissolution judgment is consistent with the MSA.

A mediated settlement agreement is in the nature of a contract and is binding on the parties. *Tornstrom v. Tornstrom*, 887 N.W.2d 680, 686 (Minn. App. 2016). A district court has the authority to accept or reject terms of a stipulation in part or in whole, but cannot impose conditions that the parties did not agree to. *Toughill v. Toughill*, 609 N.W.2d 634, 639 n.1 (Minn. App. 2000). The district court's interpretation of a judgment incorporating a mediated settlement agreement is a question of law that we review de novo.

Halla Nursery, Inc. v. City of Chanhassen, 781 N.W.2d 880, 884 (Minn. 2010). Husband agrees that the MSA is binding. But he argues that certain provisions of the dissolution judgment relating to child support and parenting time are inconsistent with the MSA. We address each argument in turn.

Husband first contends that the parties did not agree that husband would be required to make monthly child-support payments of $890 because the MSA did not address the issue. Husband is correct that the parties checked the box labeled "not addressed" in the child-support section of the MSA. But his argument that there was no "meeting of the minds" regarding child support ignores the fact that a child-support order was issued six months before the parties agreed to resolve the remaining issues in the case and signed the MSA. Accordingly, husband's assertion that child support was "reserved" because the terms of the existing temporary order were not restated in the MSA is without merit.

Husband next challenges the parenting-time provisions, first arguing that the MSA includes a start date for the school-year schedule, but the judgment does not. The judgment was issued after the school year began. Husband does not explain how the judgment's lack of a start date that had already passed prejudiced him. *See* Minn. R. Civ. P. 61 (requiring harmless error to be ignored); *Toughill*, 609 N.W.2d at 639 (stating that a party seeking relief on appeal must show both error and resulting prejudice). Likewise, we are not persuaded by husband's contention that inclusion of a requirement that the parties notify each other if they are unavailable for scheduled parenting time violates the MSA. Husband is correct that the MSA states that its express terms may be amended by written agreement. But the MSA also provides that in the event of a parent's scheduling conflict, the other

parent has the right to exercise parenting time. In other words, the MSA contemplates that the parties will make minor modifications to their parenting time in the event of scheduling conflicts. Thus, requiring each parent to notify the other of unavailability for parenting time is consistent with the MSA.

Finally, husband's remaining challenges relate to provisions—such as those concerning the parties' tax returns—that simply incorporate the requirements of federal and state law. In sum, the dissolution judgment does not depart from the terms of the MSA.

II. The district court did not clearly err in determining husband's income.

A district court has broad discretion to provide for the support of the parties' children. *Rutten v. Rutten*, 347 N.W.2d 47, 50 (Minn. 1984). If a parent is voluntarily underemployed, his potential income is determined based on "employment potential, recent work history, and occupational qualifications in light of prevailing job opportunities and earnings levels in the community." Minn. Stat. § 518A.32, subd. 2(1) (2016). District courts review a child-support magistrate's decision de novo, and we review the district court's decision confirming the magistrate's determination for abuse of discretion. *Davis v. Davis*, 631 N.W.2d 822, 825-26 (Minn. App. 2001). Findings relating to a parent's income must be based on the facts in the record and will not be overturned unless clearly erroneous. *Id.* at 827.

Husband argues that the district court clearly erred in finding his annual income is $41,483. We disagree. Husband submitted a financial statement during the expedited child-support process that indicated his 2013 income was $41,483. The record also includes tax returns, which show "business income" of $42,265 in 2012, $55,313 in 2011,

and $70,425 in 2010. Husband argues that those documents do not accurately reflect his income, and points to his November 7, 2014 testimony before the child-support magistrate that his year-to-date gross income was approximately $6,000. But the district court determined husband's financial statement was the most current and reliable indicator of his income and that husband did not adequately explain why his income dropped so significantly in 2014. Husband also asserts that the district court erred in finding that his income was not impacted by the loss of wife's assistance in the business. The parties presented conflicting testimony as to the extent of wife's involvement in the business. Wife's testimony that while she helped out with some business-related tasks, the business income was not the product of their joint work, supports the district court's findings regarding husband's income.

Because the district court's income determination is supported by husband's financial statement and recent tax returns, we conclude the district court did not clearly err in determining husband's income.[2]

III. The district court did not abuse its discretion in awarding wife conduct-based attorney fees.

Conduct-based attorney fees may be awarded "against a party who unreasonably contributes to the length or expense of the proceeding." Minn. Stat. § 518.14, subd. 1

[2] Husband indicates there is evidence outside the record to support his contention that the district court overstated his income. The record on appeal is limited to the record that was presented to the district court. *See* Minn. R. Civ. App. P. 110.01 (defining the record on appeal). We note husband may move the district court to modify his child-support obligation if his income has substantially decreased. Minn. Stat. § 518A.39, subd. 2 (2016).

(2016). We review an award of conduct-based attorney fees for abuse of discretion. *Szarzynski v. Szarzynski*, 732 N.W.2d 285, 295 (Minn. App. 2007). Husband argues that the district court abused its discretion by awarding wife $1,335 in attorney fees and denying his request for fees.

First, husband argues the district court's finding that husband unreasonably contributed to the length of the proceeding in effect penalizes him for "not giving in to [wife's] demands." The record does not support this assertion. When wife initially submitted her proposed stipulated dissolution judgment, husband had legitimate concerns that some of its provisions were inconsistent with the MSA. Wife's counsel made husband's requested changes and sent him the revised proposed stipulated judgment. Counsel sent a follow-up letter when husband did not respond. Husband eventually returned the document without signing it or suggesting any additional changes. He simply accused counsel of "changing what [the parties] had agreed to during mediation." Husband's refusal to sign the stipulation required wife to bring a formal motion. The district court's fee award is limited to fees wife incurred after husband ceased cooperating. On this record, we discern no abuse of discretion.

Second, husband argues he is entitled to a fee award. The district court construed husband's request as seeking need-based fees. Need-based fees are appropriate when the request is made in good faith and will not cause unnecessary delay of the proceeding, the party from whom they are sought has the means to pay them, and the party seeking them does not have the ability to pay them. Minn. Stat. § 518.14, subd. 1. Husband did not establish that wife has the means to pay his attorney fees. Indeed, wife's counsel told the

district court he was representing her pro bono because she could not afford to continue paying him. And the MSA reflects the parties' agreement to be responsible for their own attorney fees. On this record, we conclude that the district court did not abuse its discretion in denying husband's request for attorney fees.[3]

IV. The district court did not err in appointing a custody evaluator.

Husband asserts that the district court erred by appointing a custody evaluator and ordering him to pay half the cost of the custody evaluation. Husband does not cite any legal authority to support this argument. An assignment of error in a brief based on "mere assertion" and not supported by argument or authority is waived unless prejudicial error is obvious on mere inspection. *State v. Modern Recycling, Inc.*, 558 N.W.2d 770, 772 (Minn. App. 1997). The record shows the district court appointed a custody evaluator in September 2014 at the request of the parties. Husband did not indicate he could not pay the custody evaluator until November 2014, after the district court made the appointment and ordered the parties to share the cost equally. Moreover, the parties agreed in the MSA they would each pay their own costs related to the dissolution proceeding. Accordingly, we discern no prejudicial error.

Affirmed.

[3] Husband also generally alleges that the "court's refusal to find a way for both parties to be represented" violated his due-process and equal-protection rights. But "[t]here is no statutory or constitutional right to counsel in a dissolution proceeding." *Reed v. Albaaj*, 723 N.W.2d 50, 56 (Minn. App. 2006).