STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0339

In re the Marriage of:
Robert William Bessenbacher, petitioner,
Appellant,

vs.

Olga Sergeyevna Bessenbacher,
Respondent,

County of Itasca, intervenor,
Respondent.

Filed August 21, 2017
Affirmed
Worke, Judge

Itasca County District Court
File Nos. 31-FA-14-2431, 31-FA-14-2754

Robert William Bessenbacher, Grand Rapids, Minnesota (pro se appellant)

Rachel L.F. Weis, Legal Aid Service of NE Minnesota, Grand Rapids, Minnesota (for respondent Olga Sergeyevna Bessenbacher)

John J. Muhar, Itasca County Attorney, Jesse Powell, Assistant County Attorney, Jennifer Ryan, Assistant County Attorney, Grand Rapids, Minnesota (for respondent County of Itasca)

Considered and decided by Worke, Presiding Judge; Johnson, Judge; and Larkin, Judge.

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

WORKE, Judge

Appellant-father challenges the district court's denial of his motion to modify spousal maintenance and child support. He also argues that the district court must reopen the judgment and decree under Minn. Stat. § 518.145, subd. 2 (2016), and that the district court abused its discretion by ordering him to pay conduct-based attorney fees. We affirm.

FACTS

Appellant-father Robert William Bessenbacher and respondent-mother Olga Sergeyevna Bessenbacher married in 1997 and divorced in 2016. They have seven minor children. The oldest child was born in 2000 and the youngest in 2014. During the dissolution proceedings, the parties agreed that the children's primary residence would be with mother. They also agreed that their oldest child, who lived with father at the time, would "be transitioned back into [m]other's home at [the child's] pace."

After a court trial on the remaining issues, the district court issued a judgment and decree on March 10, 2016. The district court found that father's monthly gross income was $7,662. Father claimed monthly expenses of $3,524, and the district court found his reasonable expenses to be $3,059. Mother had no income and had not been gainfully employed for 15 years. She was the children's primary caretaker and homeschooled the children. The district court declined to impute income to mother for purposes of determining child support.

The district court ordered father to pay $1,500 per month in permanent spousal maintenance, and $1,930 per month in child support. The district court found that this

would leave father with a monthly surplus of $1,173 that would be more than sufficient to cover "payroll deductions for taxes, health insurance, and retirement savings."

Father moved for amended findings. He sought a reduction in maintenance. He argued that the $1,173 monthly surplus was insufficient to allow him to cover payroll deductions for taxes, insurance, and retirement savings. He cited Exhibit 15 from the parties' trial, a paystub that showed that these deductions amounted to $2,085 per month. He also cited a payment calculator created by his employer to help employees estimate payroll deductions. The calculator indicated his payroll deductions were even higher.

The district court dismissed father's motion on procedural grounds. Less than two weeks later, father moved to modify maintenance and child support. He made the same arguments he previously made in his motion for amended findings. He also argued that he had increased expenses. In addition, he argued that because the oldest child was still living with him, his child-support obligation should be decreased.

The district court denied father's motion. The district court determined that father had not even alleged the necessary change in circumstances and his motion was "largely based upon an improper motion for reconsideration or amended findings regarding Exhibit 15." The district court also awarded conduct-based attorney fees to mother. The award was based on father's frivolous modification motion and other motions and conduct that "unreasonably added to the length and expense" of the proceedings. Father appeals.

D E C I S I O N

This court reviews a district court's ruling on a motion to modify maintenance or child support for an abuse of discretion. *Hecker v. Hecker*, 568 N.W.2d 705, 709-10 (Minn.

1997) (maintenance); *Moylan v. Moylan*, 384 N.W.2d 859, 864 (Minn. 1986) (support). The district court abuses its discretion when it makes findings that are not supported by the evidence or misapplies the law. *Silbaugh v. Silbaugh*, 543 N.W.2d 639, 641 (Minn. 1996). We review the district court's factual findings for clear error. *Antone v. Antone*, 645 N.W.2d 96, 100 (Minn. 2002). Factual findings are clearly erroneous if they are "manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole." *Hemmingsen v. Hemmingsen*, 767 N.W.2d 711, 716 (Minn. App. 2009) (quotation omitted), *review granted* (Minn. Sept. 29, 2009) *and appeal dismissed* (Minn. Feb. 1, 2010). We defer to the district court's credibility determinations and do not reweigh the evidence. *Dobrin v. Dobrin*, 569 N.W.2d 199, 202 (Minn. 1997) (evidence); *Knapp v. Knapp*, 883 N.W.2d 833, 837 (Minn. App. 2016) (credibility).

Before a district court may modify a maintenance or support award, the moving party must provide "clear proof" that, since the maintenance or support obligation was established or last modified, there has been a substantial change in circumstances that renders the award unreasonable and unfair. Minn. Stat. § 518A.39, subd. 2 (2016); *Bormann v. Bormann*, 644 N.W.2d 478, 480-81 (Minn. App. 2002) (support); *Tuthill v. Tuthill*, 399 N.W.2d 230, 232 (Minn. App. 1987) (maintenance) (quotation omitted). There are eight statutory grounds for a finding of changed circumstances, including, for example, "substantially increased or decreased gross income of an obligor or obligee" and "substantially increased or decreased need of an obligor or obligee or the child or children that are the subject of [the] proceedings." Minn. Stat. § 518A.39, subd. 2(a).

Maintenance

Father first argues that the district court abused its discretion by denying his motion to modify maintenance because Exhibit 15 shows that his payroll deductions are much greater than the district court found in the original judgment and decree. But Exhibit 15 cannot show a substantial change in circumstances because it is dated several months before the judgment and decree established the maintenance award. Exhibit 15 was evidence at the parties' trial. The district court stated in its order denying father's modification motion that it "did not give [Exhibit 15] significant evidentiary weight because [mother] argued credibly and persuasively that the document did not accurately reflect [father's] financial circumstances, as he increased his tax withholding in order to make his income appear lower." We do not reweigh evidence and we defer to the district court's credibility determinations. *Dobrin*, 569 N.W.2d at 202; *Knapp*, 883 N.W.2d at 837. Moreover, father did not appeal the original maintenance award and the order is now final. *See Dieseth v. Calder Mfg. Co.*, 275 Minn. 365, 370, 147 N.W.2d 100, 103 (1966) (stating that an appealable order is final when the deadline to appeal has expired, even if the order is wrong in certain respects). Father's modification motion does not allow him to relitigate Exhibit 15.

Father also points to a payment calculator that he claims shows his payroll deductions are currently even higher than indicated on Exhibit 15. But the payment calculator, which father first filed in district court just over a month after the judgment and decree was issued, shows total payroll deductions of $2,353 per month, and father claims in his brief that at the time the maintenance award was set, his payroll deductions were

$2,227 per month. Given father's $7,662 monthly income, a $126 increase in monthly payroll deductions is not a substantial change in circumstances. Moreover, the payment calculator suffers from credibility issues identical to those the district court pointed to in Exhibit 15. It is unreliable because it allows the user to manipulate the amount of payroll deductions. The payment calculator does not show a substantial change in circumstances. *See Deliduka v. Deliduka*, 347 N.W.2d 52, 57 (Minn. App. 1984) ("We will not disturb the [district] court's maintenance or child support awards on the basis of unsubstantiated claims and self serving figures as to a party's income tax liabilities."), *review denied* (Minn. July 26, 1984).

Father next argues that an increase in his other monthly expenses supports a modification of maintenance. But a comparison of father's claimed expenses at trial and the expenses he claimed in the affidavit attached to his modification motion shows little change. In his affidavit, father claimed that, excluding payroll deductions, his total monthly expenses are $3,582. At trial, father claimed $3,524 in monthly expenses. The district court found some of the $3,524 in expenses unreasonable and reduced the amount to $3,059. In his affidavit, father again claimed many of the expenses that the district court previously found unreasonable. As the district court found, father has not shown any substantial change in his expenses.

Father also claims that he bears additional costs as a result of the marital debt allocated to him in the judgment and decree. But, as the district court found, this does not show a change in circumstances. The district court was fully aware of this debt allocation when it established the maintenance award. *See Abuzzahab v. Abuzzahab*, 359 N.W.2d

329, 332 (Minn. App. 1984) (explaining that "changes directly resulting from the property division are not the type of changes" that allow a modification of spousal maintenance because the district court contemplated them when it divided the property). Similarly, father argues that the support and maintenance obligations themselves constitute a substantial change in circumstances. Again, as the district court imposed these obligations in the judgment and decree, they cannot show a change in circumstances. *See id.*

Finally, father argues that the district court abused its discretion by failing to impute income to mother. Father, again, fails to even allege a substantial change in circumstances. While the district court declined to impute income for purposes of child support, in the spousal-maintenance context, the question is not solely one of income imputed but of "the financial resources of the party seeking maintenance . . . and the party's ability to meet needs independently." Minn. Stat. § 518.552, subd. 2(a) (2016); *Rauenhorst v. Rauenhorst*, 724 N.W.2d 541, 543 (Minn. App. 2006). In determining the amount and duration of maintenance, the district court must also consider, "the standard of living established during the marriage" and, "in the case of a homemaker, the length of absence from employment" and the extent to which earning capacity has been permanently decreased as a result. Minn. Stat. § 518.552, subd. 2(c), (d) (2016). Moreover, one of the grounds for granting maintenance is whether the spouse seeking maintenance "is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside of the home." *Id.*, subd. 1(b) (2016).

In the judgment and decree, the district court found that mother has been out of the workforce since 2001. She was once employed as a Russian translator, but her certification

lapsed and she would need additional training to return to that field. There is also little demand for Russian translators where mother lives. As a result, the district court found that, without additional training, mother is qualified only for minimum-wage employment. During the marriage, mother stayed home and cared for the children and the parties enjoyed a "middle-class" lifestyle supported by father's income. Mother is the primary caretaker for at least six of the parties' seven children and homeschools the children. Both parents and a guardian ad litem agreed that homeschooling is in the children's best interests. While the district court found that mother was "capable of being employed," it also found that "continued homeschooling is in the children's best interests" and "it is not practical to expect [mother] to be a homeschool teacher, and at the same time hold a job that would allow her to earn self-support at a level equivalent to the marital standard of living."

Father cites to translator and other job postings as evidence that mother is capable of returning to work and making more than minimum wage. These postings do not show any change in circumstances. Many of the positions are part-time, freelance, or temporary and several of them are low paying or do not list a salary or hourly rate. Most of the Russian translator positions are out of state. More importantly, these postings do not demonstrate any change in the training and homeschooling issues cited in the judgment and decree.

Child support

Father next argues that the district court abused its discretion by denying his motion to modify child support because the parties' oldest child resides with him. But this does not show a substantial change in circumstances. The parties' oldest child resided with

father when the child-support order was originally established. Although the district court ordered the child to "be transitioned back into [m]other's home," it stated that the transition would be at the child's "pace" and gave no timetable.

Moreover, the fact that one child resides with father does not have a substantial effect on father's child-support obligation. Six of the parties' seven children reside with mother. Because the child-support guidelines account for only six children, Minn. Stat. § 518A.35, subd. 2 (2016), the original support order was calculated based on six, not seven, children residing with mother. Also, given mother's minimal income, any offset of father's child-support obligation as a result of one child residing with him would be minimal. *See* Minn. Stat. § 518A.34(c)(1) (2016) (providing for an offset of child-support obligations in cases of "split custody").

One child residing with father is not a substantial change in circumstances because the child resided with father when the support order was established and has little effect on father's support obligation.

Reopening the judgment and decree

Father next argues that the judgment and decree should be reopened under Minn. Stat. § 518.145, subd. 2, on the basis of mistake and fraud. The statute permits relief from a judgment and decree in cases of mistake or fraud. Minn. Stat. § 518.145, subd. 2(1), (3). The moving party bears the burden of proving mistake or fraud by a preponderance of the evidence. *Knapp*, 883 N.W.2d at 835.

The district court did not address father's motion to reopen the judgment. We generally do not consider issues that were not addressed by the district court. *Thiele v.*

Stich, 425 N.W.2d 580, 582 (Minn. 1988). Nevertheless, we have the discretion to address an issue in the interest of justice. *See* Minn. R. Civ. App. P. 103.04. We have analyzed father's arguments and conclude that they are meritless.

Father first argues that in the original judgment and decree, the district court mistakenly cut his monthly medical, dental, and vision insurance costs in half because the expenses are "*per paycheck*," not per month, and he receives two paychecks per month. He also claims that in the judgment and decree the district court erred by adjusting his food budget from $500 to $350. Section 518.145, subdivision 2, is intended to correct a mistake of a party and cannot be used to correct judicial error. *See Shirk v. Shirk*, 561 N.W.2d 519, 522 n.3 (Minn. 1997) (noting linguistic and functional similarities between Minn. Stat. § 518.145, subd. 2, and Minn. R. Civ. P. 60.02); *Carter v. Anderson*, 554 N.W.2d 110, 113 (Minn. App. 1996) (stating that rule 60.02 "does not allow for general correction of judicial error"), *review denied* (Minn. Dec. 23, 1996). The proper method to challenge judicial error is to appeal from the original judgment. *Erickson v. Erickson*, 506 N.W.2d 679, 680 (Minn. App. 1993) ("Expiration of the time for appeal precludes the losing party from seeking to modify or vacate the judgment because of judicial error."). The time to appeal the March 2016 judgment and decree has long expired. *See* Minn. R. Civ. App. P. 104.01, subd. 1 ("Unless a different time is provided by statute, an appeal may be taken from a judgment within 60 days after its entry."). Father cannot use section 518.145, subdivision 2, to extend the time period to challenge these alleged judicial errors.

Father's fraud claim is also meritless. Father appears to argue that mother committed fraud by failing to inform the district court that she receives $600 in food

support from the county. But the judgment and decree specifically notes that mother receives $600 per month in public assistance food support. Accordingly, the district court was aware of the food support and mother could not have committed fraud that effected the judgment and decree by failing to disclose her receipt of that support.

Conduct-based attorney fees

The district court may require a party who "unreasonably contributes to the length or expense of the proceeding" to pay the other party's attorney fees. Minn. Stat. § 518.14, subd. 1 (2016). The party seeking the fees has the burden of establishing that the other party's conduct unreasonably contributed to the length or expense of the proceeding. *Geske v. Marcolina*, 624 N.W.2d 813, 818 (Minn. App. 2001). The district court must make findings explaining an award of conduct-based fees. *Brodsky v. Brodsky*, 733 N.W.2d 471, 477 (Minn. App. 2007). Specifically, the district court must identify the conduct that justifies the award and determine that it occurred during the litigation. *Geske*, 624 N.W.2d at 819. We review a district court's award of conduct-based fees for an abuse of discretion. *Sanvik v. Sanvik*, 850 N.W.2d 732, 737 (Minn. App. 2014).

The district court awarded mother $2,827 in conduct-based attorney fees. The award was based on father's motion to modify maintenance and support, father's motion to vacate an order for protection (OFP), and father's failure to comply with a temporary spousal-maintenance order.

The district court found that father's motion to modify was frivolous because it failed to allege a substantial change in circumstances. This court recently stated that "[a] motion for conduct-based attorney fees may be based on the opposing party's pursuit of

frivolous . . . claims." *Baertsch v. Baertsch*, 886 N.W.2d 235, 239 (Minn. App. 2016). As explained above, the record supports the district court's finding that father's modification motion was frivolous because it failed to allege a substantial change in circumstances.

Similarly, the district court found that father's motion to vacate the OFP was frivolous because the motion "lacked any basis in statute or case law." The district court filed the OFP on September 12, 2014. The OFP was effective for two years. At a hearing on April 15, 2016, the district court extended the OFP's expiration date to April 15, 2018. The district court found that father had violated the existing OFP by having contact with mother. On September 14, 2016, father moved to vacate the OFP. Father claimed that the district court's order extending the OFP was "without findings." But the order was based on an on-the-record finding that father violated the OFP, and Minn. Stat. § 518B.01, subd. 6a(b)(1) (2016), allows a district court to extend an OFP for two years based on a finding that the order was violated. *See Braend ex rel. Minor Children v. Braend*, 721 N.W.2d 924, 927-28 (Minn. App. 2006); *see also* Minn. R. Civ. P. 52.01 (noting that findings of fact may be made from the bench).

Also, father provided no legal basis for challenging the extension of the OFP nearly five months after the district court issued the extension order. The district court assessed father's motion under Minn. R. Civ. P. 60.02(f), which allows the district court to relieve a party from a final judgment for "[a]ny . . . reason justifying relief from the operation of the judgment." But rule 60.02(f) may not be used to correct judicial error. *Carter*, 554 N.W.2d at 113. Moreover, the rule requires the party seeking relief to demonstrate:

> (1) a reasonable defense on the merits; (2) a reasonable excuse for his or her failure to act; (3) that he acted with due diligence after notice of the entry of judgment; and (4) that no substantial prejudice will result to the opposing party if the motion to vacate is granted.

Nguyen v. State Farm Mut. Auto. Ins. Co., 558 N.W.2d 487, 490 (Minn. 1997). Father failed to establish the first prerequisite, and there is no indication in the record that father even attempted to establish the remaining elements. The record supports the district court's finding that father's motion to vacate the OFP was frivolous.

Finally, the district court found that father unreasonably added to the length and expense of the proceedings by failing to comply with a temporary spousal-maintenance order. Father's actions caused mother to initiate contempt proceedings. The district court ultimately found that father had violated the temporary order and held him in contempt. In its contempt order, the district court found that father "has acted in bad faith and violated court orders on financial matters throughout the duration of these proceedings."

Father unreasonably added to the length and expense of the proceedings by making frivolous motions and failing to comply with a court order. The district court did not abuse its discretion by ordering father to pay conduct-based attorney fees.

Affirmed.