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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1357**

In re the Marriage of:
Mary Elizabeth Moline, petitioner,
Respondent,

vs.

Daniel Robert Moline,
Appellant.

**Filed October 28, 2019
Affirmed
Cleary, Chief Judge**

Dakota County District Court
File No. 19WS-FA-16-1304

Christopher M. Banas, Banas Family Law, P.A., Lilydale, Minnesota (for respondent)

David C. Gapen, Jade K. Johnson, Gapen, Larson & Johnson, LLC, Minneapolis, Minnesota (for appellant)

Considered and decided by Hooten, Presiding Judge; Cleary, Chief Judge; and Worke, Judge.

UNPUBLISHED OPINION

CLEARY, Chief Judge

In this appeal from the district court's denial of husband's motion to terminate spousal maintenance, husband argues that the district court (1) erred by ruling on his

motion without an evidentiary hearing; (2) abused its discretion by denying his motion; and (3) abused its discretion by awarding attorney fees to wife. We affirm.

FACTS

Appellant Daniel Robert Moline (husband) and respondent Mary Elizabeth Moline (wife) dissolved their 28-year marriage in July 2017. The parties stipulated to the terms of the dissolution judgment and decree, under which husband agreed to pay \$6,750 per month in spousal maintenance to wife. At the time of the divorce, wife had a gross income of approximately \$21,000 per year and monthly expenses of \$7,000. Husband had a gross income of approximately \$189,000 per year working as an attorney for Travelers Indemnity Company.

In December 2017, husband moved to Sweden and married a new spouse. He voluntarily terminated his employment with Travelers because the company did not permit him to work remotely. He had been searching for employment in Sweden without success for over a year prior to his move. Because he was unemployed, husband moved to terminate his spousal-maintenance obligation.

The parties' stipulation provided that the district court would hold an evidentiary hearing on any modification motion. The district court scheduled an evidentiary hearing, at which husband did not appear. The attorneys agreed to waive the evidentiary hearing. The district court denied husband's motion after finding that his voluntary termination of employment did not constitute a good-faith effort to comply with his spousal-maintenance

obligation, and ordered husband to pay \$5,000 in need-based attorney fees. Husband appeals.

D E C I S I O N

I. The district court did not err as a matter of law by declining to conduct an evidentiary hearing on husband’s motion.

A waiver of an evidentiary hearing should be made clear from the record. *Thompson v. Thompson*, 55 N.W.2d 329, 333 (Minn. 1952). While a district court is not required to conduct an evidentiary hearing on a motion to modify or terminate spousal maintenance, *Sieber v. Sieber*, 258 N.W.2d 754, 756 (Minn. 1977), husband and wife stipulated that the district court would conduct an evidentiary hearing upon a motion to modify or terminate spousal maintenance.

Husband contends that he did not voluntarily waive his right to an evidentiary hearing. Husband did not argue to the district court that he did not waive his right to an evidentiary hearing or that his attorney was not authorized to waive the hearing on his behalf. This court generally does not consider issues not raised to or considered by the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).

The record indicates that husband waived the hearing. The district court scheduled an evidentiary hearing after husband filed his motion. Counsel for husband appeared, but husband did not. Wife’s attorney informed the district court that “[i]n lieu of continuing this matter out for an evidentiary hearing . . . counsel is going to submit proposed [f]indings to [the district court].” The district court then clarified with husband’s attorney that this

was an accurate recitation of the parties' agreement, and husband's attorney replied, "[c]orrect." Both parties later submitted their respective proposed findings of fact.

Husband argues that his mere participation in the deficient procedure does not imply waiver of his right to an evidentiary hearing under *Adam v. Adam*, 358 N.W.2d 487, 489 (Minn. App. 1984). But this court in *Adam* acknowledged that an express agreement to submit the issue to the district court without a hearing would constitute a waiver of the right to an evidentiary hearing. 358 N.W.2d at 489. Here, counsel for each party expressly agreed to submit the issue to the district court without an evidentiary hearing.

Husband does not specifically argue that he did not authorize his attorney to waive the hearing on his behalf. Instead, his argument is primarily that he did not make an express, voluntary waiver of his right to the hearing. His only argument that his attorney did not have his authorization to waive the hearing is that the record does not contain "any indication that [husband's] attorney was authorized to waive [husband's] right to an evidentiary hearing on [husband's] behalf." An assignment of error in a brief based on "mere assertion" and not supported by argument or authority is not properly before this court. *Schoepke v. Alexander Smith & Sons Carpet Co.*, 187 N.W.2d 133, 135 (Minn. 1971). The district court did not err in ruling on husband's motion without an evidentiary hearing.

II. The district court did not abuse its discretion when it denied husband's motion to terminate spousal maintenance.

We review a district court's decision to modify spousal maintenance for an abuse of discretion. *Madden v. Madden*, 923 N.W.2d 688, 696 (Minn. App. 2019). A district

court abuses its discretion if its factual findings are unsupported by the record or if it misapplies the law. *Id.* This court must uphold a district court's findings of fact regarding spousal maintenance unless they are clearly erroneous. *Hemmingsen v. Hemmingsen*, 767 N.W.2d 711, 716 (Minn. App. 2009), *review granted* (Minn. Sept. 29, 2009) *and appeal dismissed* (Minn. Feb. 1, 2010). A finding of fact is clearly erroneous if it is not reasonably supported by the evidence as a whole. *Id.*

Husband argues that he made a showing of a substantial change in circumstances that made the current maintenance award unreasonable and unfair under Minn. Stat. § 518A.39, subd. 2(a)(1) (2018). The party moving to modify spousal maintenance has the burden not only of showing a substantial change in circumstances but also that the change makes the maintenance award unreasonable and unfair. *Hecker v. Hecker*, 568 N.W.2d 705, 709 (Minn. 1997). A change of circumstances includes a substantial increase or decrease in a party's earnings. *O'Donnell v. O'Donnell*, 678 N.W.2d 471, 475 (Minn. App. 2004). Because husband is unemployed, it is undisputed that his income has substantially decreased. The issue remaining is whether husband's decrease in income has rendered the existing award unreasonable and unfair.

If an obligor voluntarily creates a change in circumstances, the district court can consider the obligor's motives and can deny modification if the change was created to obtain a modification. *Hemmingsen*, 767 N.W.2d at 717. If a career change resulting in decreased earnings was made in good faith so that the obligor could continue to meet his maintenance obligations, the district court may modify maintenance. *Giesner v. Giesner*,

319 N.W.2d 718, 720 (Minn. 1982); *see also Richards v. Richards*, 472 N.W.2d 162, 165 (Minn. App. 1991) (stating that, if obligor’s voluntary early retirement results in reduction in income, and obligee claims bad faith, district court should evaluate obligor’s intent to determine whether early retirement was made in good faith). We defer to the district court’s credibility determinations. *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988). This rule applies when evidence is presented through affidavits. *Hestekin v. Hestekin*, 587 N.W.2d 308, 310 (Minn. App. 1998).

The district court found that husband’s voluntary termination of his employment “[did] not constitute a reasonable effort to comply with his obligations under the stipulated divorce decree” and that “[his] reduction in income [was] solely the fault of his own.” It further stated that it “concluded that [husband] did not make a good-faith effort to comply with the terms of the stipulated divorce decree.”

Husband argues that the district court clearly erred in finding that he did not act in good faith because the parties were aware of his planned move. He contends that the terms of the current award are unreasonable and unfair because he is incapable of earning income in Sweden equal to that which he earned in the United States, and he has pursued numerous job opportunities without success.

Husband moved to Sweden and voluntarily terminated his employment knowing of his maintenance obligations and of wife’s expenses. Husband’s affidavit, on which he based his motion, states that he had been searching for employment in Sweden since November 2016. He was aware of the difficulties in finding employment in Sweden but

he nevertheless moved there in 2017, knowing that he would likely experience a reduction in income. Husband contends that the district court is required to evaluate his subjective intent. But the district court did evaluate his intent and found that he terminated his employment solely to be with his current spouse, not with the intent of continuing his maintenance obligations. The record supports the district court's finding that husband's reduction in income was not made in good faith. Husband also asserts that the current maintenance award is unreasonable and unfair because he is unable to afford it with his current income. But this court has upheld a maintenance obligation that exceeded an obligor's income. *Ganyo v. Engen*, 446 N.W.2d 683, 687 (Minn. App. 1989).

Husband further argues that the district court erred by failing to make specific findings under Minn. Stat. § 518.552 (2018), and that as a result this court should remand for the district court's consideration of the statutory factors. But if the party moving for modification fails to show that the substantial change in circumstances renders the current maintenance award unreasonable and unfair, the district court need not consider the section 518.552 factors. *See Tuthill v. Tuthill*, 399 N.W.2d 230, 232 (Minn. App. 1987) (applying predecessor to Minn. Stat. § 518A.39). We affirm the district court's denial of husband's motion to terminate spousal maintenance.

III. The district court did not abuse its discretion by awarding attorney fees to wife.

Attorney fees in dissolution proceedings are generally governed by Minn. Stat. § 518.14, subd. 1 (2018), which allows for need-based fee awards. *Geske v. Marcolina*, 624 N.W.2d 813, 816 (Minn. App. 2001). A district court "shall" award attorney fees

where it finds that (1) the fees are necessary to a party's good-faith claim and will not contribute unnecessarily to the length and expense of the proceeding; (2) the party from whom fees are sought has the means to pay; and (3) the party who seeks the fees does not have the means to pay them. Minn. Stat. § 518.14, subd. 1. An award of attorney fees under section 518.14, subdivision 1 "rests almost entirely within the discretion of the [district] court and will not be disturbed absent a clear abuse of discretion." *Schallinger v. Schallinger*, 699 N.W.2d 15, 24 (Minn. App. 2005) (quotation omitted), *review denied* (Minn. Sept. 28, 2005); *but see Holmberg v. Holmberg*, 588 N.W.2d 720, 727 (Minn. 1999) (stating that section 518.14, subdivision 1, *requires* the court to award attorney fees if statutory requirements are met).

The district court awarded need-based attorney fees to wife. It found that wife's motion in opposition to husband's motion to modify maintenance was a good faith assertion of her rights. The district court also found that husband has the means to pay the award, and wife does not have the means to pay her attorney fees.

Husband argues that the district court failed to make findings on the statutory factors and that this court must remand for specific findings on the income and expenses of the parties. But this court has upheld a district court's attorney-fee award without specific findings when it discussed the parties' finances fully in prior orders. *Dobrin v. Dobrin*, 555 N.W.2d 921 (Minn. App. 1996), *rev'd on other grounds*, 569 N.W.2d 199 (Minn. 1997). Here, the original stipulated divorce decree contains thorough findings regarding the parties' income and expenses.

Further, while the district court did not make specific findings on husband's income after he terminated his employment, it made findings regarding the parties' income during the marriage. And a district court may impute income to an obligor when it finds the obligor has acted in bad faith in limiting his income. *Melius v. Melius*, 765 N.W.2d 411, 416-17 (Minn. App. 2009). Because the district court found that husband did not act in good faith, it did not err in finding that husband had the means to pay the award based on his income during the marriage. The district court did not abuse its discretion.

Affirmed.