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Minn. Stat. § 480A.08, subd. 3 (2018).

STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1204

In re the Marriage of:

Sara Lynn Garcia,
Respondent,

vs.

Reuben Jesse Garcia, petitioner,
Appellant.

Filed August 17, 2020
Affirmed in part and reversed in part
Smith, Tracy M., Judge

Hennepin County District Court
File No. 27-FA-16-5621

Perry M. Smith, St. Louis Park, Minnesota; and

Paige V. Orcutt, Trial Group North, Duluth, Minnesota (for respondent)

Kathleen M. Miller, KMH Custom Family Law, PLLC, Eagan, Minnesota (for appellant)

Considered and decided by Smith, Tracy M., Presiding Judge; Reilly, Judge; and Florey, Judge.

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

SMITH, TRACY M., Judge

Appellant Reuben Jesse Garcia challenges both the district court's postdecree order determining his child-support obligation and the judgment awarding attorney fees to

respondent Sara Lynn Garcia. As to the first challenge, Reuben[1] argues that the district court clearly erred by finding that he was voluntarily underemployed and by not considering certain facts when calculating his potential income for child-support purposes. As to the second, he contends that the district court abused its discretion by awarding a conduct-based attorney fee to Sara for conduct that occurred before the legal proceeding began. We affirm in part and reverse in part.

FACTS

Reuben and Sara divorced in October 2016 pursuant to a stipulated decree. As part of the decree, they agreed to joint legal and joint physical custody of their two minor children, J.G. and L.G. The decree reserved the issue of child support, with the parties agreeing to work together to provide for their children. The decree also included an "Appendix A," which required the parties to notify each other and the court if they changed addresses and gave each parent the right to know the names and addresses of the children's schools. The decree did not state which schools the children would attend. At the time, both parties were living near the Twin Cities.

The matter at issue here began when, two years after the dissolution of the marriage, Sara moved the district court to modify child custody and determine child support. The facts of the appeal come from the parties' affidavits and exhibits in connection with the motion.

[1] The parties' first names are used for clarity.

In May 2018, J.G. and L.G. were staying with Reuben when L.G. sent Sara text messages and videos, claiming that Reuben was throwing J.G. around. Child-protective services (CPS) investigated the matter and discussed it with Reuben, but took no further action. CPS also disclosed to Reuben that L.G.'s videos were the source of its information. After that, Reuben communicated to Sara that L.G. could no longer stay with him and that he had gotten rid of all of her belongings.

Soon after, in the summer of 2018, Reuben moved to Texas, and Sara moved to Duluth. When Reuben moved, J.G. went to stay with him, with Sara agreeing that J.G. could stay there until school started in Minnesota. As part of agreeing to send J.G. to stay with Reuben, Sara required Reuben to give her his Texas address. Reuben provided an address but then, after J.G. had left for Texas, said that he was not living at that address. Sara requested Reuben's address multiple times after that, but Reuben responded that it was none of her business and refused to provide it.

While J.G. was in Texas, Reuben registered him for classes at a charter school without telling Sara. Sara learned about the school registration. Based on that and on Reuben's refusal to provide an address, Sara decided not to send J.G. back to Texas later in the summer after J.G. returned to Minnesota for an outing with Sara's family. A few months later, Sara brought her motion for child custody and to determine child support.

The parties participated in mediation and reached an agreement with respect to child custody. This agreement, which is also reflected in the later district court order, stated that the parties would maintain joint physical and joint legal custody of the children but also that the children's primary residence would be with Sara. The children would attend school

in Duluth, but Reuben would have parenting time during certain school breaks. The parties did not reach an agreement during mediation with respect to child support, so the matter proceeded to a hearing. Following the hearing, the referee issued a recommended order, which the district court thereafter approved.

The primary issue with respect to child support was the calculation of both Sara's and Reuben's income. The district court found that both Sara and Reuben were voluntarily underemployed. Both were teachers and had Master's degrees in education, but, at the time of the motion, Sara was working for a business in Duluth, earning $16 an hour, while Reuben was working as a temporary security guard, earning $14 an hour. The district court concluded that each of the parties had a potential annual income of $60,000 and used that amount to determine that Reuben had a monthly child-support obligation of $1,026.

The district court also granted Sara's request for conduct-based attorney fees, concluding that Reuben's conduct prompted this action and that he "unreasonably contributed to the length and expense of this proceeding."[2]

Reuben appeals.

[2] The district court also denied Reuben's request to reopen the dissolution judgment. Reuben had requested that the decree be reopened in part because he claimed that he and Sara had agreed that she would receive the parties' house in exchange for Reuben keeping his pension and Sara not seeking child support. On appeal, Reuben does not challenge the district court's denial of his motion to reopen the judgment.

D E C I S I O N

I. The district court did not clearly err by assigning potential income to Reuben.

Reuben argues that the district court clearly erred both when it found that he was voluntarily underemployed and when it calculated his potential income based on that finding. Appellate courts review a district court's factual finding as to whether a parent is voluntarily underemployed for clear error. *Welsh v. Welsh*, 775 N.W.2d 364, 370 (Minn. App. 2009). A person's gross income for child-support purposes includes his or her potential income, *id.* at 369, and appellate courts apply a clear-error standard of review to a district court's findings of gross income, *Schisel v. Schisel*, 762 N.W.2d 265, 272 (Minn. App. 2009). To show clear error, "the party challenging the findings must show that despite viewing that evidence in the light most favorable to the [district] court's findings . . . the record still requires the definite and firm conviction that a mistake was made." *Vangsness v. Vangsness*, 607 N.W.2d 468, 474 (Minn. App. 2000).

A. Voluntarily underemployed

Reuben asserts that the district court erred when it found that he was voluntarily underemployed because he claims that he was forced out of his teaching position five years earlier, had unsuccessfully sought another teaching position, and has a medical condition that limits his ability to work.

To determine the presumptive child-support obligation of a parent, a court must first determine the gross income of each parent. Minn. Stat. § 518A.34, subd. (b)(1) (2018). But if a parent is voluntarily underemployed or unemployed, child support instead "must be calculated based on a determination of potential income." Minn. Stat. § 518A.32, subd. 1

(2018). Minnesota law excludes certain individuals from being considered voluntarily underemployed. A parent is not considered voluntarily underemployed if the underemployment "represents a bona fide career change that outweighs the adverse effect of that parent's diminished income on the child." Minn. Stat. § 518A.32, subd. 3(2) (2018). Additionally, a parent is not considered voluntarily underemployed if the underemployment is because the "parent is physically or mentally incapacitated." Minn. Stat. § 518A.32, subd. 3(3) (Supp. 2019).

Our review of the record reveals that it contains support for the district court's finding that Reuben is voluntarily underemployed. Reuben has extensive training and experience in the teaching field. At the time of the motion, he was earning about $29,000 annually as a security guard. Five years earlier, in Minnesota, he was making about $80,000 annually as a teacher at the time he left his job. At the time of the motion, the average salary of a teacher in the Birdville Texas School District where Reuben was residing was $60,000 annually. Reuben's affidavit, while vague, indicates that he voluntarily left the teaching profession due to stress, that he made efforts to find another teaching job in Minnesota between 2014 and 2015, and that he never sought a teaching job in Texas. These facts all support the district court's finding that Reuben is voluntarily underemployed.

Reuben contends, however, that his affidavit includes facts that contradict this finding. He claims that he was forced to change professions when he stopped teaching. He explained to the district court that he no longer has a desire to teach, though he also told the district court that he does not have an "ideal" profession. On appeal, he asserts that it

is unrefuted that he was forced out of the teaching position. He similarly states that it is unrefuted that he tried unsuccessfully to find another teaching job.

As an initial matter, Reuben's affidavit does not lay out his claimed history with as much detail as he implies on appeal. What he now describes as him being forced out of the teaching profession, his affidavit describes as a voluntary choice to address the stress caused by negative reviews. The affidavit provides speculative context for why he received negative reviews, but it also states that he "ultimately left the teaching profession," not that he was fired or laid off. His description of his subsequent job search in Minnesota is vague. The affidavit also makes no reference to the job market for teachers in Texas.

More importantly, however, with respect to the broader factual issue of whether Reuben was voluntarily underemployed, the parties' affidavits conflicted, and thus the district court had to make factual findings based on its assessment of the evidence and the credibility of the parties. *See Knapp v. Knapp*, 883 N.W.2d 833, 837-38 (Minn. App. 2016), *review denied* (Minn. Sept. 27, 2016). Even if Reuben unambiguously claimed that he had been forced out and was unsuccessful in searching for another teaching job, the record contained evidence that he was qualified to teach and that it was primarily his lack of desire to teach that was preventing him from taking steps to obtain a teaching job in Texas. The fact that the record may have contained some contradictory evidence is insufficient to show that the district court clearly erred in its factual finding. *See Vangsness*, 607 N.W.2d at 474.

Reuben points out that he changed professions five years earlier, which shows that he was not "motivated by an intent to evade his child support obligation." But a finding of bad faith is not required to impute income to a parent for child-support purposes. *Melius v.*

Melius, 765 N.W.2d 411, 415 (Minn. App. 2009); *see* Minn. Stat. § 518A.32 (2018). Reuben does not dispute that, with his education and experience, he is qualified to be a teacher. Reuben's assertion that he "did not recently change professions" suggests that he claims to have made a bona fide career change, but he points to no evidence that this career change "outweighs the adverse effect of that parent's diminished income on the child." *See* Minn. Stat. § 518A.32, subd. 3(2).

Reuben also argues that, based on a letter from his doctor, he cannot be considered voluntarily underemployed pursuant to Minn. Stat. § 518A.32, subd. 3(3). The letter, dated October 2018, is the only evidence that Reuben provided of his medical condition. The letter discusses Reuben's recovery from a surgery to remove cancer from his kidney and states that he "continues to have discomfort and pain which does not allow him to work at his customary employment." But section 518A.32 places the burden on the parent claiming medical hardship to avoid imputed income to show that he is "physically or mentally incapacitated"; Reuben provides no evidence or explanation of how he is currently physically incapacitated with respect to teaching but still able to work a "full-time position" in security on "the overnight shift."[3]

Lastly, Reuben suggests that the district court erred by making its factual findings without sworn testimony. The factual evidence provided by the parties was in the form of sworn affidavits. There was no evidentiary hearing, but neither party requested one.

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[3] Reuben also discusses two unpublished opinions of this court, but unpublished opinions are not precedential. *See Dynamic Air, Inc. v. Bloch*, 502 N.W.2d 796, 800 (Minn. App. 1993).

Generally, in family court, motions are "submitted on affidavits, exhibits, documents subpoenaed to the hearing, memoranda, and arguments of counsel." Minn. R. Gen. Prac. 303.03(d)(1). And appellate courts "defer to the district court's credibility determinations as to conflicting affidavits." *Knapp*, 883 N.W.2d at 837. The district court may implicitly assess the credibility of the parties' affidavits and use those affidavits to make findings. *See Knapp*, 883 N.W.2d at 837; *cf. Pechovnik v. Pechovnik*, 765 N.W.2d 94, 99 (Minn. App. 2009) (deferring to an implicit credibility determination made by the district court). A party may request a hearing for oral testimony, but, if no such request is made, the district court "shall not take oral testimony at the scheduled hearing unless the court in its discretion solicits additional evidence from the parties by oral testimony." Minn. R. Gen. Prac. 303.03(d)(5). The district court did not err by making its findings based upon the record before it.

In sum, the district court did not clearly err by finding that Reuben is voluntarily underemployed.

B. Potential income determination

Reuben next argues that the district court erred by attributing to him as potential income his earlier income as a teacher when he was employed in another profession in another state. A parent's potential income may be determined by calculating a "parent's probable earnings level 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).

Sara affirmed that the average salary for a full-time teacher in the Birdville, Texas, school district where Reuben lives was $60,000 annually. Reuben argues that it was an error for the district court to rely on this number, but he points to no evidence in the record contradicting the amount. "On appeal, a party cannot complain about a district court's failure to rule in h[is] favor when one of the reasons it did not do so is because that party failed to provide the district court with the evidence that would allow the district court to fully address the question." *Eisenschenk v. Eisenschenk*, 668 N.W.2d 235, 243 (Minn. App. 2003), *review denied* (Minn. Nov. 25, 2003).

Reuben contends that the district court did not take various factors into account. He argues, for instance, that the district court failed to consider the fact that Reuben had not taught for five years. He also asserts that the district court failed to take into account the smaller community to which Reuben had moved and the impact that would have on his potential salary. But the district court's finding indicates that the court did take those factors into account because the finding reflects a lower salary than the $80,000 salary that Reuben earned several years earlier as a teacher in Minnesota.

Reuben also argues that the district court did not make sufficient findings about his ability to meet the legal requirements to return to the teaching profession, such as getting licensed to teach in Texas. But Reuben provided no evidence on his claimed inability to meet the legal requirements to teach in Texas. *See Eisenschenk*, 668 N.W.2d at 243. He told the district court that he had no desire to teach, not that he was legally incapable of teaching. Reuben had taught in Minnesota, and the district court used that information to

reasonably conclude that Reuben could satisfy the legal requirements in Texas but had chosen not to because he did not want to teach.

Finally, Reuben argues that the district court failed to make various findings related to the statutory description of how to calculate potential income. He asserts that the district court did not appropriately consider his recent work history when determining his imputed salary and failed to make findings regarding job opportunities in Reuben's community.

With respect to Reuben's recent work history, the district court did note that Reuben was working as a security guard. But the district court did not link the $60,000 imputed salary to his recent work history, presumably because his recent work history would not affect the calculation. The $60,000 salary was a logical potential salary given Reuben's qualifications and the evidence before the district court on the average salary of Birdville school district teachers.

As to whether there were job opportunities in Reuben's community, the district court explained that it was finding that, given Reuben's experience and education, he was qualified to teach and only declined to do so because he no longer had the desire to teach. Reuben's counsel represented to the district court that Reuben teaches social studies and that that is a competitive area with limited jobs. But the referee asked Reuben's counsel whether Reuben had applied to any teaching jobs in Texas, and she said that he had not. On this record, Reuben has failed to show that the district court's determination of his potential salary as a teacher in Texas was clearly erroneous.

II. The district court abused its discretion by awarding conduct-based attorney fees for actions that took place before litigation.

Reuben contends that the district court erred by awarding conduct-based attorney fees against him based on conduct that occurred prior to this proceeding. Appellate courts review an award of conduct-based attorney fees for an abuse of discretion. *Gully v. Gully*, 599 N.W.2d 814, 825 (Minn. 1999).

The district court awarded conduct-based attorney fees to Sara, finding that Reuben had unreasonably contributed to the length and expense of the proceeding. A district court may award attorney fees "against a party who unreasonably contributes to the length or expense of the proceeding." *Geske v. Marcolina*, 624 N.W.2d 813, 818 (Minn. App. 2001) (quotation omitted).[4] But, generally, "behavior occurring outside the litigation process" cannot be the basis for such a fee award. *Id.* at 819.

The district court found that Reuben had prompted Sara's motion by enrolling J.G. in a Texas school without her permission, intentionally giving Sara a wrong address for his residence, and sending accusatory and threatening emails. Reuben argues that this conduct all took place outside the scope of proceedings, and thus the award of attorney fees is an abuse of discretion. Sara responds that his actions "were part of the litigation" because the

[4] The parties do not appear to dispute whether Minn. Stat. § 518.14, subd. 1, the statute relied on in *Geske* for the authority to award conduct-based attorney fees, provides a substantive basis for an award of conduct-based fees. We have previously assumed the statute does so, without actually deciding the matter. *See Madden v. Madden*, 923 N.W.2d 688, 702 (Minn. App. 2019).

original decree reserved the issue of child support and the district court retained jurisdiction to change child support as well as modify orders related to child custody and parental time.

While Reuben's conduct may have been the impetus for her motion, Sara offers no precedential authority[5] for her position that any conduct in connection with the subjects of child support, child custody, and parental time is part of the litigation process for purposes of conduct-based attorney fees. Sara's motion was the first motion from either party to modify the original decree. The parties had no pending motion or other matters before the district court. It is true that they reserved the matter of child support in the original divorce decree, but the decree stated that the parties were doing so because they planned to support the children together without a court order. Thus, the conduct identified by the district court all occurred outside the scope of the current litigation. Under *Geske*, an award of conduct-based attorney fees based on such conduct is an abuse of discretion. *See* 624 N.W.2d at 818-19.

Moreover, while the parties had to return to court to resolve their dispute, nothing in Reuben's conduct contributed to the length or expense of the proceeding any more than if the parties simply had not agreed on a new child-custody or child-support arrangement. Reuben withheld information from Sara that the divorce decree required him to share, and the parties had not agreed that J.G. would go to school in Texas. But the divorce decree did not contemplate what would happen if one of the parties moved out of the state or if the parties disagreed about which schools the children would attend. Addressing these matters

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[5] Both parties cite unpublished opinions of this court for their persuasive value, but none of these opinions is binding precedent. *See Dynamic Air*, 502 N.W.2d at 800.

would have required similar proceedings even if Reuben had not engaged in any of the identified conduct.

Sara suggests that Reuben unreasonably extended proceedings by refusing to participate in mediation. But the district court stated in its order that it based the award of an attorney fee on Reuben's decision to enroll J.G. in school in Texas, his refusal to provide Sara with his real address, and the content of his emails. Because those bases do not justify the award of conduct-based attorney fees in this case, we reverse the award.

Affirmed in part and reversed in part.