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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A10-1456**

In re the Marriage of: Brent Burke Johnson, petitioner,  
Appellant,

vs.

Cynthia Ann Johnson,  
Respondent.

**Filed June 20, 2011  
Affirmed in part, reversed in part, and remanded  
Larkin, Judge**

Hennepin County District Court  
File No. 27-FA-000271608

Brent B. Johnson, Breezy Point, Minnesota (pro se appellant)

Pamela L. Green, Green Law Office, P.A., Golden Valley, Minnesota (for respondent)

Considered and decided by Kalitowski, Presiding Judge; Wright, Judge; and  
Larkin, Judge.

**UNPUBLISHED OPINION**

**LARKIN**, Judge

Appellant challenges the district court's denial of his motion for spousal-maintenance modification, assigning error to several of the district court's findings of fact. Because any error in the findings is non-prejudicial, and because the district court

did not abuse its discretion in denying appellant’s motion, we affirm in part. But because the district court erred by reserving respondent’s motion for attorney fees for one year, we reverse in part and remand.

## D E C I S I O N

### I.

Appellant-husband Brent Burke Johnson argues that the district court abused its discretion in denying his motion to modify his spousal-maintenance obligation. An appellate court reviews a district court’s decision regarding whether to modify an existing maintenance award for an abuse of discretion. *Hecker v. Hecker*, 568 N.W.2d 705, 709-10 (Minn. 1997); *see also Claybaugh v. Claybaugh*, 312 N.W.2d 447, 449 (Minn. 1981) (stating that “[a]lthough the [district] court is vested with broad discretion to determine the propriety of a modification, we have suggested that [district] courts exercise that discretion carefully”). A district court abuses its discretion regarding a maintenance determination if its findings of fact are unsupported by the record or if it improperly applies the law. *Dobrin v. Dobrin*, 569 N.W.2d 199, 202 (Minn. 1997) (citing *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988)).

Husband requested modification of his spousal-maintenance obligation under Minn. Stat. § 518A.39, subd. 2(a) (2010), which provides:

The terms of an order respecting maintenance or support may be modified upon a showing of one or more of the following, any of which makes the terms unreasonable and unfair: . . . (2) substantially increased or decreased need of an obligor or obligee . . . (4) a change in the cost of living for either party as measured by the Federal Bureau of Labor Statistics; . . . (6) a change in the availability of appropriate health care

coverage or a substantial increase or decrease in health care coverage costs[.]

There is a “a dual burden on the party seeking modification – first, to demonstrate that there has occurred a substantial change in one or more of the circumstances identified in the statute and second, to show that the substantial change has the effect of rendering the original award unreasonable and unfair.” *Hecker*, 568 N.W.2d at 709.

Husband’s primary assertion in support of modification is that his recent Hepatitis C diagnosis and planned course of treatment compromised his ability to work full-time and constituted a substantial change in circumstances that rendered the previous order unreasonable and unfair. The district court concluded that husband failed to demonstrate a substantial change of circumstances related to his Hepatitis C diagnosis. This conclusion finds support in the record. Husband moved for modification of his spousal-maintenance obligation two months before he started treatment. At the hearing, husband admitted that his motion was predicated on assumptions: he did not know if he was going to suffer side effects from treatment, he did not know the severity of any side effects he might suffer, and no one told him he would be unable to work.

Husband also admitted that his medical records did not support his sworn statement, in his supporting affidavit, that he was told to avoid strenuous work during his Hepatitis C treatment. He further admitted that no one told him to expect that he would be unable to work during treatment. Instead, he made that assumption on his own. And although husband testified that he suffered from side effects including back and muscle pain, “brain fog,” and vertigo, wife’s witness, Dr. Jeffrey Albrecht, a gastroenterologist,

testified that such symptoms are subjectively based on self-reporting and impossible to verify by medical testing.

Dr. Albrecht also testified that the majority of Hepatitis C patients with non-seasonal occupations continue their normal work activity through treatment, and in fact, physicians encourage patients to continue their normal activities. Dr. Albrecht testified that he has “patients who are in construction trades who work very hard during the summer who are able to do that on [the medications that husband is taking]. . . . [A] lot of people that work manual labor . . . are able to do that,” and he testified that there is nothing in husband’s medical records to indicate that his side effects are particularly bad or out of the ordinary. Dr. Albrecht also noted that he saw nothing in husband’s medical records indicating that his doctors advised against working during treatment and that such recommendations, if made, are typically noted in the medical file.

Husband provided his own testimony, his Hepatitis C diary, and a copy of his statements to his doctor to support his claim that he could not work due to his Hepatitis C treatment. The district court’s rejection of husband’s claim is based on an implicit credibility determination to which we defer, *see Sefkow*, 427 N.W.2d at 210 (stating that appellate courts defer to district court credibility determinations), especially where no independent medical evidence supports the claim and the expert testimony refutes it.

Husband also challenges several of the district court’s findings of fact, arguing that they are unsupported by the record. “Findings of fact concerning spousal maintenance must be upheld unless they are clearly erroneous.” *Gessner v. Gessner*, 487

N.W.2d 921, 923 (Minn. App. 1992); *see also* Minn. R. Civ. P. 52.01 (stating that findings of fact “shall not be set aside unless clearly erroneous”).

Husband primarily argues that “[t]he [district] court erred in finding that [his] treatment for Hepatitis C was unnecessary, could be stopped prior to completion, and could have been timed to avoid missing work.” But this finding is not dispositive of the issue presented: whether husband proved that his Hepatitis C treatment prevented him from working and thereby established a substantial change of circumstances that rendered the previous order unreasonable and unfair. We have reviewed the record and conclude that—even if clearly erroneous—none of the challenged findings is prejudicial. Reversal is therefore not required. *See* Minn. R. Civ. P. 61 (requiring harmless error to be ignored); *Midway Ctr. Assocs. v. Midway Ctr., Inc.*, 306 Minn. 352, 356, 237 N.W.2d 76, 78 (1975) (stating that to prevail on appeal a party must show error and resulting prejudice). As for the findings of fact challenged in husband’s reply brief, issues not raised or argued in appellant’s brief cannot be revived in a reply brief. *See McIntire v. State*, 458 N.W.2d 714, 717 n.2 (Minn. App. 1990), *review denied* (Minn. Sept. 28, 1990).

Husband also argues that the district court abused its discretion by concluding that he failed to prove that his cost of living had changed so as to render the terms of the existing maintenance order unreasonable and unfair. Husband contends that his evidence demonstrated that his cost of living had increased because he was “sick and broke,” he had to pay his health-insurance deductible, and he owed money to his father. The district court disagreed stating, “[husband] presented no evidence regarding a change in the cost

of living.” We have reviewed the record and find no abuse of discretion in this determination.

Husband further argues that he does not have the means to satisfy a previous order that two months of spousal-maintenance payments be kept in escrow. The district court reiterated that requirement in the current order. But husband did not challenge the two-month escrow requirement in his motion to modify spousal maintenance. This argument is therefore not properly before this court, and we do not consider it. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that generally an appellate court will not consider matters not argued to and considered by the district court).

Lastly, husband argues that the district court did not provide conclusions of law. It is true that the order does not contain a separate “conclusions of law” section, but the district court’s legal conclusions are contained within the “findings” section. The district court’s decision to format its order in this manner is not a basis for reversal. *See* Minn. R. Civ. P. 61 (requiring harmless error to be ignored); *Midway Ctr. Assocs.*, 306 Minn. at 356, 237 N.W.2d at 78 (stating that to prevail on appeal a party must show error and resulting prejudice); *see also Graphic Arts Educ. Found., Inc. v. State*, 240 Minn. 143, 145-46, 59 N.W.2d 841, 844 (1953) (noting that if a finding of fact is labeled a conclusion of law or a conclusion of law is labeled a finding of fact, the determination will be treated in accordance with its nature and not its incorrect label, and that the relevant question is whether the determination is adequately supported). In sum, the district court’s decision to deny husband’s request for spousal-maintenance modification was not an abuse of discretion. We therefore affirm in part.

## II.

After the district court denied husband's motion to modify his spousal-maintenance obligation, wife moved for conduct and need-based attorney fees. The district court reserved wife's motion for attorney fees for one year and ordered that wife may schedule a hearing to revisit the issue in August 2011. The district court further ordered that if wife does not schedule a hearing, the motion shall be dismissed. Lastly, the district court ordered that "If [wife] schedules a motion for early August 2011, both parties shall submit updated financial statements. By July 1, 2011, [husband] shall submit his 2010 tax return and year-to-date income and expense figures to [wife]." Husband contends that the district court's reservation of wife's motion for attorney fees was an abuse of discretion and that the motion should have been denied. Wife agrees that the district court abused its discretion by reserving her motion and argues that we should remand the issue to the district court for a determination of the appropriate fee amount. "The standard of review for an appellate court examining an award of attorney fees is whether the district court abused its discretion." *Gully v. Gully*, 599 N.W.2d 814, 825 (Minn. 1999).

The district court reserved the issue of attorney fees for one year so it could have the "benefit of updated financial information." We agree with the parties that the district court had sufficient financial information available to rule on wife's fee request at the time of the hearing. Moreover, wife should not have been required to wait one year, and to schedule another hearing, to obtain a ruling. Finally, we recognize that the issue can soon be presented for a decision under the current order. We therefore reverse the district

court's reservation of wife's motion for attorney fees and remand for a ruling on the motion. On remand, the decision whether to reopen the record for additional evidence regarding the parties' current financial circumstances is entrusted to the district court's discretion. *See Duffey v. Duffey*, 432 N.W.2d 473, 476 (Minn. App. 1988) (stating that if a district court does not have "specific directions as to how it should proceed" on remand, it has discretion to "proceed in any manner not inconsistent with the remand order.").

**Affirmed in part, reversed in part, and remanded.**

Dated:

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Judge Michelle A. Larkin