STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1179

In re the Marriage of:
Kathleen Mary Norblom, petitioner,
Respondent,

vs.

Paul Bryan Norblom, co-petitioner,
Appellant,

and

County of Dakota, Intervenor.

Filed August 5, 2008
Affirmed in part, reversed in part, and remanded
Wright, Judge

Dakota County District Court
File No. F5-96-13141

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Considered and decided by Minge, Presiding Judge; Klaphake, Judge; and Wright, Judge.

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

WRIGHT, Judge

Appellant-father argues that the district court erroneously refused to use father's subsequent child as a basis to deviate downward from father's guideline child-support obligation, mischaracterized certain expenses of his subsequent child, and made findings of fact that are not supported by the record. Father also argues that the district court erred by increasing his support obligation retroactively and by denying his motion for amended findings or a new trial. Respondent-mother challenges the district court's denial of her motion for conduct-based attorney fees. We affirm in part, reverse in part, and remand.

FACTS

The April 1996 judgment dissolving the parties' marriage awarded respondent-mother Kathleen Norblom sole physical custody of their son and set appellant-father Paul Norblom's child-support obligation. In October 2004, intervenor Dakota County moved to increase father's child-support obligation. Father responded with a motion to modify custody. In its order dated December 23, 2004, the district court granted an evidentiary hearing on father's motion to modify custody and reserved the motion to modify child support. The parties settled their custody dispute in April 2005, but a written order with the terms of that stipulation was not immediately drafted. In fall 2005, mother asked father for his financial information to address the child-support issue, but father did not immediately provide that information. When he did, the parties were unable to resolve the child-support issue. In October 2006, mother moved the district court to increase child support and sought retroactive application of the increase to November 1, 2004, the

date when the modification based on the county's motion would have been effective if the county's motion had been granted.

Father opposed this motion, arguing that he had remarried, he and his new wife have a daughter, and their daughter's needs had to be considered in setting his child-support obligation for son. After a hearing, the district court issued an order dated January 23, 2007, that increased father's child-support obligation to the guideline amount of $1,106.88, made the increase retroactive to November 1, 2004, awarded mother a judgment for $14,578.75 in unpaid child support, added $221.38 to father's monthly guideline child-support obligation as a payment against the unpaid child support, and denied both parties' motions for attorney fees. The district court made a minor amendment to one finding of fact, but otherwise denied the parties' posthearing motions. This appeal followed.

D E C I S I O N

I.

The needs of subsequent children "shall be" considered when addressing whether to increase an existing child-support obligation. Minn. Stat. § 518.551, subd. 5f (2004). Father argues that the district court erred by increasing his child-support obligation without considering daughter's expenses as required by Minn. Stat. § 518.551 (2004). Indeed, the district court misinterpreted *In re Paternity of J.M.V.*, 656 N.W.2d 558, 566 (Minn. App. 2003), *review denied* (Minn. Apr. 23, 2003), to require consideration of subsequent children only to the extent that the obligor is paying a court-ordered child-support obligation for a subsequent child; and it ruled that daughter's expenses need not

be considered because she is living with father and there is no court-ordered child-support obligation for her. But the district court also performed an alternative analysis that applies section 518.551, subdivision 5f. Because that analysis demonstrates that the district court addressed the subsequent-child factors required by section 518.551, subdivision 5f, we reject father's assertion that the district court failed to apply section 518.551, subdivision 5f.[1]

II.

The child-support guidelines are presumptively appropriate "in all cases." Minn. Stat. § 518.551, subd. 5(i). When determining whether to deviate from the child-support guideline amount based on an obligor's subsequent child, the district court must consider the factors set forth in section 518.551, subdivision 5f. Father challenges the district court's interpretation of section 518.551, subdivision 5f, as well as certain findings of fact made by the district court when applying that statute.

Statutory construction presents an issue of law, which we review de novo. *Lewis-Miller v. Ross*, 710 N.W.2d 565, 568 (Minn. 2006). By contrast, we review the district

[1] We observe that *J.M.V.* involved a different issue and does not preclude application of section 518.551, subdivision 5f, here. *J.M.V.* involved an obligor with three court-ordered child-support obligations and addressed the extent to which any one obligation was affected by the others; it did not address the extent to which a district court considers expenses associated with a child living with an obligor. 656 N.W.2d at 562-66; *see Skelly Oil Co. v. Comm'r of Taxation*, 269 Minn. 351, 371, 131 N.W.2d 632, 645 (1964) (stating that "the language used in an opinion must be read in the light of the issues presented" (quotation omitted)); *Stageberg v. Stageberg*, 695 N.W.2d 609, 613 n.2 (Minn. App. 2005) (applying *Skelly Oil* in family-law case), *review denied* (Minn. Jul. 19, 2005); *see also State ex rel. Jarvela v. Burke*, 678 N.W.2d 68, 71 (Minn. App. 2004) (reversing and remanding an increase of child-support obligation because district court failed to consider obligor's subsequent children), *review denied* (Minn. July 20, 2004).

court's findings of fact for clear error. Minn. R. Civ. P. 52.01. A finding is clearly erroneous if, when considering the record in the light most favorable to the findings and with deference to the fact-finder's credibility determinations, we are "left with the definite and firm conviction that a mistake has been made." *Vangsness v. Vangsness*, 607 N.W.2d 468, 472 (Minn. App. 2000) (quotation omitted). Under this standard, a finding is not clearly erroneous merely because the record also contains evidence to support a finding other than the one made by the district court. *Id.* at 474.

A.

When addressing whether to deviate from the guideline child-support amount based on an obligor's subsequent child, the district court must consider, among other things, the obligor's ability to contribute to dependent children, "taking into account the obligor's income and reasonable expenses exclusive of child care." Minn. Stat. § 518.551, subd. 5f(1). Here, the district court refused to include in father's monthly expenses $305 of tuition for daughter's full-day kindergarten, stating that it was functionally daycare.

Father argues that the district court erred by not considering the kindergarten costs for daughter because the prohibition on considering childcare costs arises from section 518.551, subdivision 5(b), which apportions between parents the childcare costs for the child who is the subject of the child-support proceeding. He maintains that the childcare costs excluded from consideration are not those associated with the child living

in the obligor's home (daughter). Rather, he contends, they are the childcare costs for the child for whom support is being set (son).[2]

Contrary to father's argument, the subsequent-child statute does not limit the childcare-cost exclusion to the child who is the subject of the child-support proceeding. *Id.* Thus, we decline to interpret the childcare-cost exclusion as father urges. But on this record, it is undisputed that daughter was attending full-day kindergarten with a monthly tuition of $305. Moreover, there is nothing in the record that suggests that daughter's kindergarten was primarily supervisory, rather than educational, in nature. We, therefore, reverse the district court's exclusion of the cost of daughter's kindergarten from father's expenses when determining his ability to pay child support.

B.

1.

Father incorrectly asserts that the district court failed to make a finding of daughter's total needs. When setting child support, the district court stated that it considered what it found to be daughter's reasonable monthly expenses of $202,

[2] Father also argues that the district court was required to accept the decision he and his wife made to put daughter in full-day kindergarten because, under *Auge v. Auge*, 334 N.W.2d 393 (Minn. 1983), a district court should not "micromanage" choices by custodial parents. *Auge* is distinguishable because it addressed a custodial parent's ability to remove a child's residence from Minnesota, not the effect on child support of subsequent children. 334 N.W.2d at 399. Further, in an opinion issued after father filed his brief in this appeal, the Minnesota Supreme Court addressed the effect of a post-*Auge* statutory amendment and stated that "our ruling in [*Auge*], has no remaining vitality because it has been superseded in its entirety by statute." *Goldman v. Greenwood*, 748 N.W.2d 279, 283 n.5 (Minn. 2008).

"exclusive of all day kindergarten costs."[3] This finding is consistent with father's allegation that daughter's monthly expenses, including $305 for full-day kindergarten, were $507. In other documents, however, father presented daughter's expenses in other amounts. Father's inconsistent claims regarding daughter's expenses may have been confusing. But a district court's finding is clearly erroneous if the reviewing court is left with a definite and firm conviction that a mistake has been made. *Gjovik v. Strape*, 401 N.W.2d 664, 667 (Minn. 1987). We have a definite and firm conviction that the monthly costs of raising this child exceed $202.

When presented with an inadequate or unclear record, the district court has a duty to inquire of the parties to insure that it can comply with its statutory obligations. *See Manore v. Manore*, 408 N.W.2d 883, 888 (Minn. App. 1987) (vacating default judgment when district court failed to make "appropriate inquiries" to insure that it had sufficient information to satisfy its duties). Here, section 518.551, subdivision 5f, required the district court to determine daughter's reasonable monthly expenses, the record was unclear, and the district court made no inquiries to clarify that record. We, therefore, remand this issue with directions to the district court to readdress daughter's reasonable monthly expenses so as to make findings regarding those expenses that are both realistic and supported by the record.

[3] We reject father's argument that daughter's monthly needs should have been found by multiplying what father claims are his "apportionable expenses" by the quotient of son's "current [2006] needs" ($1,604.97) and the "total family needs" of mother's family from 2004 ($6,246). It is neither self-evident nor explained in father's argument how dividing son's 2006 needs by mother's family's 2004 expenses bears on finding daughter's current needs.

2.

When addressing a child-support obligor's ability to pay, the district court may consider debts owed to private creditors, but only if, among other things, the district court finds that the debts were reasonably incurred to support the child or to generate income. Minn. Stat. § 518.551, subd. 5(d)(2). Here, the district court found that father's claimed expenses include $281 in debt service "including debt for legal fees for these proceedings." And it refused to consider those debts in addressing father's ability to pay child support because father failed to show that they were incurred to support the child or to generate income.

Father asserts that the debt was incurred for the reasonable support of both son and daughter and for the generation of income. But father does not support his assertion with a citation to the record. Nor does he cite any legal authority for his assertion. Absent an identified factual or legal basis for his challenge to the district court's finding, his challenge is waived. *Schoepke v. Alexander Smith & Sons Carpet Co.*, 290 Minn. 518, 519-20, 187 N.W.2d 133, 135 (1971); *Braith v. Fischer*, 632 N.W.2d 716, 725 (Minn. App. 2001) (applying *Schoepke* in family matter), *review denied* (Minn. Oct. 24, 2001). Moreover, the record supports the district court's finding. The exhibit to father's affidavit shows the debts in question to be credit card debts, and father's affidavit does not identify the nature of the debts. The district court, in discussing father's mortgage expenses, implicitly found father's financial evidence, generally, to lack credibility, which is a determination to which we defer. *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988).

In determining father's ability to pay child support, the district court's finding of father's expenses includes his second mortgage. We, therefore, reject father's argument that the district court erroneously failed to consider the expenses related to his second mortgage when determining his ability to pay child support.

3.

Father also argues that the district court erroneously included his wife's student loans in his household income for determining his ability to contribute to his children's support. Income is defined as "any form of periodic payment to an individual." Minn. Stat. § 518.54, subd. 6 (2004). In *Gilbertson v. Graff*, we held that student-loan proceeds of a child-support obligor that exceed the amount required for tuition and books are income under section 518.54, subdivision 6. 477 N.W.2d 771, 773-74 (Minn. App. 1991). But the student-loan proceeds at issue here are not those of the obligor. Rather, they are his wife's. We decline to extend *Gilbertson* to include in an obligor's income the excess student-loan proceeds of the obligor's spouse when, as here, repayment of those loans was scheduled to begin shortly after the district court made its ruling in these proceedings.

4.

Challenging the district court's findings regarding son's needs, father cites exhibit 3 to his "2/21/07" affidavit and argues that his 2006 monthly gross income is $5,509.49. But the record does not contain an affidavit that is dated February 21, 2007. Although exhibit 3 to the March 1, 2007 affidavit addresses father's income, it is unclear how father's 2006 gross monthly income relates to son's needs. Moreover, if father cites

exhibit 3 as a challenge to the district court's finding regarding father's 2006 gross monthly income, remand is unwarranted because the district court found that father's 2006 gross monthly income is $5,528, which is $18.51 more than father's claim. *See Wibbens v. Wibbens*, 379 N.W.2d 225, 227 (Minn. App. 1985) (refusing to remand for de minimis error).

To the extent that father asserts that son's expenses were inflated by the lifestyle fostered by the income of mother's current husband, we are not persuaded. While father asserts that son's monthly expenses should be $1,355, he does not identify the source of that amount. Thus, we cannot evaluate the merits of father's assertion, and the argument is not properly before us. *Schoepke*, 290 Minn. at 519-20, 187 N.W.2d at 135; *Braith*, 632 N.W.2d at 725.

5.

Father also challenges the district court's finding of his income for child-support purposes by purportedly calculating his income under the "reduced ability" method for setting child support for an obligor with children in multiple families. Under the reduced-ability method, child support is set by applying the guidelines to an obligor's net monthly income after the obligor's net monthly income is "reduced by the amount of any previous support orders that are currently being paid." *Wollschlager v. Wollschlager*, 395 N.W.2d 134, 135 (Minn. App. 1986) (quotation omitted) (citing amendment to guidelines providing for reduced-ability method). But father misapplies the reduced-ability formula. He proposes reducing his net monthly income by a child-support obligation for daughter (the subsequent child) and then setting child support for

son (the prior child) based on his remaining income. *See* Minn. Stat. § 518.551, subd. 5f(4) (requiring support for prior child to be at least equal to that for subsequent child). Because father is not paying a child-support order for daughter, a deduction for her under the reduced-ability method is without statutory support.

6.

Father's argument that the district court overstated his income for child-support purposes by including his union dues in his income has merit. Net monthly income for child-support purposes excludes union dues. *Id.*, subd. 5(b) (listing deductions). Although father's failure to clearly raise this issue until his posthearing motion was procedurally flawed, *see* Section VI below, and although the information presented regarding father's union dues was incomplete, because other aspects of this case must be remanded, we direct the district court on remand to exclude father's union dues from its determination of father's net monthly income to the extent that the record permits those dues to be calculated.

7.

Father also challenges the findings of mother's 2004 net monthly income and her current net monthly income. He argues that the findings understate her income because they adopt the figures in mother's check stubs, which include deductions that are not allowed for determining income for child-support purposes. But because section 518.551, subdivision 5f, does not require the district court to determine the custodial parent's income, any error in the district court's determination of mother's income is harmless. *See* Minn. R. Civ. P. 61 (requiring harmless error to be ignored).

III.

Child support may be modified if a moving party establishes that a substantial change in circumstances has rendered the existing child-support obligation unreasonable and unfair. Minn. Stat. § 518.64, subd. 2(a) (2004). Whether to modify child support is discretionary with the district court. *Putz v. Putz*, 645 N.W.2d 343, 347 (Minn. 2002). If application of the child-support guidelines to the parties' current circumstances results in a guideline child-support obligation at least 20 percent and $50 different from the existing child-support obligation, it is presumed that there has been a substantial change in circumstances, and there is a rebuttable presumption that the existing child-support obligation is unreasonable and unfair. Minn. Stat. § 518.64, subd. 2(b)(1) (2004); *see Frank-Bretwisch v. Ryan*, 741 N.W.2d 910, 914 (Minn. App. 2007) (noting that two presumptions were created by section 518.64, subdivision 2(b)(1)). But satisfying the presumptions does not require a modification, and rebuttal of presumed unreasonableness and unfairness does not preclude modification. *O'Donnell v. O'Donnell*, 678 N.W.2d 471, 477 (Minn. App. 2004).

Here, the district court ruled that satisfaction of the statutory presumptions "entitl[ed]" mother "as a matter of law" to a modification of child support. In doing so, the district court misapplied the law regarding the modification presumptions and failed to exercise its discretion. When a district court addresses a discretionary matter as a matter of law, a remand is appropriate to allow the district court to exercise its discretion. *See In re Welfare of M.F.*, 473 N.W.2d 367, 370 (Minn. App. 1991) (remanding for

district court to exercise discretion). Further, as addressed above, several of the child-support-related findings of fact are not supported by the record. We, therefore, remand to the district court with directions to exercise its discretion regarding whether to modify child support in light of findings of fact that are supported by the record.

IV.

Father argues that the district court erroneously put the burden of proof on him to justify a deviation from the guideline child-support obligation. In support of his argument, he contends that, (1) for modification of child support, the burden of proof is on the party seeking the modification, who is mother; and (2) under Minn. R. Evid. 301, the modification presumptions of Minn. Stat. § 518.64, subd. 2(b) (2004), should not alter that burden of proof. This argument is unavailing. Because the child-support guidelines are rebuttably presumed to apply in all cases, the burden of showing the propriety of a deviation is on the party seeking the deviation. *Buntje v. Buntje*, 511 N.W.2d 479, 481 (Minn. App. 1994). Father sought a deviation from the guideline child-support obligation. Therefore, the district court properly required him to justify the deviation that he sought.

V.

Father next challenges the district court's decision to make the increase in his child-support obligation retroactive to November 1, 2004. Although our remand renders it premature to address the propriety of a retroactive modification, it is almost certain that the question of the effective date of any modification will be at issue on remand. Therefore, in the interests of judicial economy, we will address father's challenges to the

retroactive nature of his increased child-support obligation. *See In re Estate of Vittorio*, 546 N.W.2d 751, 756 (Minn. App. 1996) (addressing issue likely to arise on remand in interest of judicial economy).

Absent circumstances that are not at issue here, a child-support modification may be retroactive "only with respect to any period during which the petitioning party has pending a motion for modification but only from the date of service of the motion." Minn. Stat. § 518.64, subd. 2(d) (2004). Whether to make a modification retroactive is discretionary with the district court. *Guyer v. Guyer*, 587 N.W.2d 856, 859 (Minn. App. 1999), *review denied* (Minn. Mar. 30, 1999).

The December 23, 2004 order reserved the county's motion to modify child support. The parties do not cite section 518.64, subdivision 2(d), and do not address whether a "reserved" motion is "pending" for the purpose of that statute. "Pending" is defined as "[r]emaining undecided; awaiting decision." *Black's Law Dictionary* 1154 (7th ed. 1999); *cf. Spears v. State*, 725 N.W.2d 696, 700 (Minn. 2006) (stating in criminal context that case is "pending" until "the availability of direct appeal has been exhausted and the time for a petition for certiorari has lapsed, or a petition for certiorari with the United States Supreme Court has been filed and finally denied"). Here, the county's motion was not decided initially because father moved to modify custody; nor was it decided later because father failed to produce his financial information in a timely fashion. Thus, not only was the county's motion "undecided," but it also was "undecided" because of father's conduct. Moreover, the record establishes that mother's

October 27, 2006 motion to increase child support was an effort to obtain a decision on the issue previously raised in the county's motion but reserved by the district court.

Father argues that neither party understood that their stipulated reservation of the child-support issue would allow any modification to be retroactive. But the district court rejected "all" of father's arguments against retroactivity. And its rejection of this argument is consistent with the transcript, which shows that the parties' April 2005 settlement "made clear that the issue of support was still pending."

Citing *McNattin v. McNattin*, 450 N.W.2d 169 (Minn. App. 1990), father argues that mother is estopped from seeking child support retroactive to a date before October 27, 2006, when she served her motion. Also, father cites *Mulroy v. Mulroy*, 354 N.W.2d 66 (Minn. App. 1984), in support of his argument that, although the district court's December 23, 2004 order stated that child support was reserved, it did not explicitly reserve the question of retroactive modification and, therefore, retroactivity should not be allowed here. Both *McNattin* and *Mulroy* are distinguishable because, unlike the facts here, they both involved a motion to initially set child support after a reservation. *McNattin*, 450 N.W.2d at 171-72; *Mulroy*, 354 N.W.2d at 69. Moreover, *McNattin* involved "unusual facts," including fraud by the party moving to set child support. 450 N.W.2d at 171. When a party seeks to *modify* child support, a modification generally is "retroactive to the date the moving party served notice of the motion on the responding party." *Bormann v. Bormann*, 644 N.W.2d 478, 482 (Minn. App. 2002). Thus, we reject father's arguments, based on *McNattin* and *Mulroy*, against retroactivity.

Father also argues that any delay in resolving the child-support issue was not his fault, but that of mother's attorney because mother's counsel did not draft a custody stipulation. The district court found that, "[b]ut for [father]'s motion to change custody, his support would have been increased as of November 2004." This matter has been assigned since January 2005 to the same district court judge who has handled this matter since shortly after the county moved to modify child support. When the district court increased father's child-support obligation retroactively, it was familiar with the matter of the undrafted stipulation, as well as the conduct of the parties and their attorneys. *Cf. Mikoda v. Mikoda*, 413 N.W.2d 238, 242 (Minn. App. 1987) (stating that "great weight" is given to judge's interpretation of judge's own order), *review denied* (Minn. Dec. 22, 1987). On this record, father has not shown that the conduct of wife's attorney precludes the district court from making the increase in father's child-support obligation effective as of November 1, 2004.

The district court set father's child-support obligation for the period dating back to November 1, 2004, based on its finding of father's *current* income rather than father's income and expenses during the earlier period for which child support was awarded. On remand, when calculating father's earlier child-support obligation, the district court shall set that obligation in light of father's net monthly income and ability to pay child support as of the time for which child support is being set. *Cf. County of Nicollet v. Larson*, 421 N.W.2d 717, 720 (Minn. 1988) (remanding for hearing to determine obligor's actual ability to pay for period during which county sought reimbursement). We recognize that, because father's income and expenses appear to have changed during the course of these

extended proceedings, the district court may calculate different child-support obligations if it deems appropriate for different periods of time.

VI.

Father also challenges the district court's ruling that he improperly presented new evidence regarding his income and union dues in his motion for amended findings or a new trial. New evidence is not to be considered in addressing a motion for amended findings. *Rathbun v. W.T. Grant Co.*, 300 Minn. 223, 238, 219 N.W.2d 641, 651 (1974). Although Minn. R. Civ. P. 59.01 permits a district court that tried a matter without a jury to consider new evidence when addressing a motion for a new trial, this matter was a motion under Minn. Stat. § 518.64 (2004) to modify child support. Because a modification proceeding under section 518.64 is not a trial but rather a special proceeding, a new-trial motion is not authorized in a child-support-modification proceeding. *Huso v. Huso*, 465 N.W.2d 719, 720-21 (Minn. App. 1991). Therefore, the district court's decision as to the improper presentation of new evidence is legally sound. Because we are remanding portions of this case, we need not separately address father's assertion that the district court should have granted his motion for amended findings of fact.

VII.

The district court denied both parties' motions for conduct-based attorney fees. By notice of review, mother challenges the denial of her motion. Minn. R. Civ. App. P. 106. Conduct-based fees may be awarded against a party who unreasonably contributes

to the length or expense of the proceeding, and they are discretionary with the district court. Minn. Stat. § 518.14, subd. 1 (2006); *Szarzynski v. Szarzynski*, 732 N.W.2d 285, 295 (Minn. App. 2007).

The district court found that "[b]oth parties have proceeded in good faith." Whether a party acts in good faith is a credibility determination on which we defer to the district court. *Sefkow*, 427 N.W.2d at 210 (credibility); *Richter v. Richter*, 625 N.W.2d 490, 495 (Minn. App. 2001) (good faith), *review denied* (Minn. July 24, 2001).

Mother argues that father delayed the resolution of the child-support issue by making "groundless arguments." But father's failure to prevail does not necessarily show that he unnecessarily contributed to the length or expense of the proceeding. The December 23, 2004 order reserving child support states that "[father] has presented enough evidence to warrant an evidentiary hearing to determine whether [son] is being emotionally harmed by the current custodial and/or visitation arrangements." Thus, the district court believed that the custody-related delay had some merit. Also, although mother cites several findings in which the district court states that father's argument is "without merit," the district court's use of this phrase signified that father's argument "does not prevail" rather than "is frivolous." In light of the district court's finding that the parties proceeded in good faith, the breadth of the district court's attorney-fee-related discretion, and the district court's familiarity with the proceedings, there is no basis for us to conclude that the district court's resolution of this issue was an abuse of discretion.

On remand, the district court shall reopen the record to acquire the information necessary to make the findings required by the relevant statute, and the district court shall

have discretion to receive any other evidence it deems necessary to efficiently resolve this matter.

Affirmed in part, reversed in part, and remanded.