STATE OF MINNESOTA
IN COURT OF APPEALS
A09-306

In re the Marriage of:

Lynne Singer Grossman, petitioner,
Respondent,

vs.

Andrew Charles Grossman,
Appellant.

Filed December 1, 2009
Affirmed as modified
Kalitowski, Judge

Hennepin County District Court
File No. 27-FA-000278758

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Considered and decided by Klaphake, Presiding Judge; Kalitowski, Judge; and Huspeni, Judge.[*]

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

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

KALITOWSKI, Judge

Appellant Andrew Charles Grossman argues that the district court abused its discretion by (1) modifying his child-support obligation retroactively; (2) improperly calculating his income; (3) improperly calculating his child-support obligations; (4) excluding his expert affidavit and related documents; and (5) not permitting him to proceed with a motion for amended findings. We affirm but modify the effective date of appellant's modified child-support obligation to May 1, 2007.

D E C I S I O N

An appellate court reviews a district court's order modifying child support for abuse of discretion. *Rutten v. Rutten*, 347 N.W.2d 47, 50 (Minn. 1984). An abuse of discretion occurs when the district court resolves the matter in a manner that is "against logic and the facts on [the] record." *Id.*

I.

Appellant argues that the district court erred in modifying his child-support payment retroactive to the date that respondent first filed a motion for modification because respondent abandoned her original motion. We disagree.

Pursuant to Minn. Stat. § 518A.39, subd. 2(e) (2008), a modification of support or maintenance may be made retroactive, with respect to any period during which the petitioning party has a motion pending. "[M]odification of support is generally 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). A district court

has discretion to set the effective date of a support modification. *Finch v. Marusich*, 457 N.W.2d 767, 770 (Minn. App. 1990).

A motion to modify child support is deemed abandoned, and cannot provide a retroactive date for modification, when the petitioner merely files but fails to otherwise pursue a motion. *Hicks v. Hicks*, 533 N.W.2d 885, 886 (Minn. App. 1995). In *Hicks*, the respondent served appellant with a motion to modify child support but did not pursue the motion any further. Hicks "conducted no discovery, requested no hearings and presented no evidence to support his motion." *Id.* As a result, Hicks was deemed to have abandoned the motion. *Id*.

Here, respondent filed her motion to modify child support in April 2007. The issue was reserved by the district court twice and appellant and respondent both served discovery requests. Although respondent requested that a hearing scheduled for March 3, 2008, be canceled, there is no evidence that respondent was abandoning her motion. Unlike *Hicks*, where the respondent simply filed a motion and then never made attempts to pursue it, here respondent followed up her motion with discovery and requests for hearings.

In addition, the *Hicks* court supported its conclusion that respondent had abandoned her motion with a citation to a case where the court found a moving party guilty of the "grossest laches and neglect" in failing to prosecute its claim. *Id.* (citing *St. Paul, M. & M. Ry. V. Eckel*, 82 Minn. 278, 281-82, 84 N.W. 1008, 1009 (1901)). Unlike the respondent in *Hicks*, respondent here made efforts to pursue her motion, and is not guilty of the "grossest laches and neglect." We therefore conclude that the district court

did not abuse its discretion by determining that appellant's child-support obligation should be modified retroactive to the date that respondent filed her original motion.

Appellant argues in the alternative, that even if this court finds the district court appropriately retroactively modified child support, a clerical error in the December 15, 2008 order should be corrected. We agree. The order found that respondent's motion had been pending since sometime in April 2007, but retroactively modified appellant's child support to April 1, 2007. Because Minn. Stat. § 518A.39, subd. 2(e), provides that a modification may be made retroactive "only with respect to any period during which the petitioning party has pending a motion for modification," May 1, 2007, is the correct date of retroactive modification. We thus modify the district court's clerical error to clarify that the modification is retroactive to May 1, 2007.

II.

Appellant argues that the district court abused its discretion by imputing to him a gross monthly income based on the court's calculation of appellant's living expenses. We disagree.

The determination of a support obligor's income for child-support purposes is a finding of fact that will not be set aside unless clearly erroneous. *Ludwigson v. Ludwigson*, 642 N.W.2d 441, 446 (Minn. App. 2002). Findings of income for child-support purposes "will be affirmed on appeal if those findings have a reasonable basis in fact and are not clearly erroneous." *State ex. rel. Rimolde v. Tinker*, 601 N.W.2d 468, 470 (Minn. App. 1999). The obligation to pay child support is generally based on the court's finding that the obligor has the ability to pay. *Strandberg v. Strandberg*, 664

N.W.2d 887, 889 (Minn. App. 2003). When an obligor has a complicated financial picture, this court has used cash flow or gross receipts to calculate income for child-support purposes. *Vitalis v. Vitalis*, 363 N.W.2d 57, 59 (Minn. App. 1985). Further, this court has found that if a parent's lifestyle is commensurate with his cash flow, not his taxable income, cash flow may be a reasonable basis to extrapolate a child-support obligation. *Id.*

In its December 15, 2008 order, the district court stated that it was unable to determine appellant's actual income. But the district court found that appellant is financially secure and has significant cash flow and savings, despite his claims that he has no income. The court was presented with financial information including monthly bank statements through April 2008 with deposits of between $20,000 and $40,000 per month, and credit card statements of $25,000 to $30,000, typically paid in full every month. From this information, the district court determined that appellant's cash flow and historical monthly spending averaged $23,573 per month. The court used this figure to calculate appellant's child-support obligation based on the child-support guidelines. On this record we conclude that the district court did not abuse its discretion in its calculation of appellant's income.

Appellant also argues that he is entitled to reversal because his monthly spending is lower than what the court found. We disagree. The district court had ample evidence on the record from which it could determine that $23,573 approximated appellant's average monthly spending. Thus, the finding is not clearly erroneous.

Appellant argues that he only maintains monthly cash flow by borrowing significant sums of money. But appellant failed to provide the district court with proof of these debts. Moreover, appellant's assertion as to debt is not dispositive. In *Vitalis*, a child-support obligor similarly argued that he had to borrow a significant amount of money to meet his expenses. 363 N.W.2d at 58. But this court concluded, nonetheless, that his cash flow indicated an affluent lifestyle, and that his children deserved to benefit from his prosperity. *Id.* at 58-59. Like the court in *Vitalis*, the district court here found that appellant had a cash flow indicating an affluent lifestyle, despite unproven claims of significant debts. The district court properly found that it would be unfair to allow appellant to borrow money to live an affluent lifestyle, without giving his children a commensurate amount of child support.

Appellant also argues that the district court erred by calculating his income based on monthly spending while not applying a similar calculation to respondent's income. We disagree. Respondent has been employed as a real estate agent since 2004, and her income is documented. The district court had no reason to calculate her income based on spending. Additionally, appellant did not challenge respondent's income in the district court. Thus, the issue is not before this court on appeal. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that appellate courts will not consider matters not argued before the court below).

III.

Appellant argues that the district court abused its discretion when it established the amount of his child-support obligations in its December 15, 2008 order. Appellant

asserts that the court improperly imposed an upward deviation from the child-support guidelines by requiring him to pay insurance premiums, private school tuition, and tutoring and paraprofessional fees.

A district court has broad discretion to address issues of child support, and its decisions are reviewed for abuse of discretion. *Rutten*, 347 N.W.2d at 50.

Medical and Dental Insurance Premiums

Appellant states that he agreed to pay the full amount of his children's medical and dental insurance premiums when he was paying a lower child-support amount, but due to the increasing cost of the insurance premiums and his alleged change in financial circumstances, appellant moved the district court to order respondent to contribute to the premiums. The district court denied the request, stating that appellant "voluntarily obligated himself to pay for children's medical insurance. There is no basis in the record for changing this obligation . . . ."

Appellant argues that the district court did not properly apply Minn. Stat. § 518A.41, subd. 5(a) (2008), which provides in relevant part: "[u]nless otherwise agreed to by the parties and approved by the court, the court must order that the cost of health care coverage . . . be divided between the obligor and the obligee based on their proportionate share of the parties' monthly [parental income for child support]." Appellant argues that he no longer voluntarily agrees to pay the full amount of his children's insurance premiums, and therefore the district court erred in failing to divide insurance costs between appellant and respondent in proportion to their child-support obligations. We disagree.

Appellant does not dispute that in its June 15, 2005 order, the district court approved appellant's voluntary stipulation to pay the children's insurance premiums. Courts favor stipulations in dissolution cases as a means of simplifying and expediting litigation and to resolve difficult issues. *Shirk v. Shirk*, 561 N.W.2d 519, 521 (Minn. 1997). Stipulations are therefore granted the effect of binding contracts. *Id*. Thus, a stipulation cannot be repudiated or withdrawn unilaterally by one party without the consent of the court. *Id*. at 521-22. As different circumstances arise, parties may petition the court for review of stipulations. *Sand v. Sand*, 379 N.W.2d 119, 125 (Minn. App. 1985), *review denied* (Minn. Jan. 31, 1986). But the court is not obligated to allow respondent to withdraw from this stipulation and divide the insurance costs.

Appellant argues that the district court erred in not finding that his circumstances have changed such that he can no longer pay the insurance premiums. We disagree. When a party shows a substantial change in circumstances that makes a previously agreed-to stipulation unreasonable or unfair, a court may alter the original agreement. *Sand*, 379 N.W.2d at 125. But the district court has broad discretion to determine whether circumstances have changed enough to warrant altering a stipulation, and this court will only overturn these findings on a clear abuse of discretion. *Putz v. Putz*, 645 N.W.2d 343, 347 (Minn. 2002). Here, the district court, based on oral and documentary evidence including bank statements and credit card payments, found that there was no basis to change appellant's obligation under the parties' stipulation. When there is reasonable evidence to support district court findings, a reviewing court should not disturb them. *Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 101 (Minn. 1999). We

conclude that the district court had reasonable evidence to support its conclusion that appellant did not prove that his circumstances changed enough to warrant a change in his obligation to pay the children's insurance.

Private School Tuition

Appellant argues that the district court abused its discretion in denying his request to end his obligation to pay the children's private school tuition. We disagree.

As with the insurance premiums, appellant stipulated to this upward deviation in the 2005 order. Thus, this stipulation has the power of a binding contract that cannot be altered unilaterally without the consent of the court.

This court has held that "a party cannot complain about a district court's failure to rule in [the party's] 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). Here, the district court found that appellant could afford to pay for the children's private schooling, that he had failed to prove otherwise, and that he failed to provide accurate income information. We conclude that the district court did not abuse its discretion in upholding appellant's stipulation to pay his children's tuition, and finding that appellant failed to prove a change in circumstances that warranted modification.

Tutoring and Paraprofessional Fees

Appellant argues that the district court abused its discretion in requiring each party to pay one half of the children's tutoring and paraprofessional fees. We disagree.

The district court has broad discretion in determining support obligations; if the determination has an acceptable and reasonable basis in fact, it should be affirmed. *Mancuso v. Mancuso*, 417 N.W.2d 668, 671 (Minn. App. 1988). The district court found that the children have significant mental health needs, and that one child has special needs for which he requires a paraprofessional. The record indicates that the district court considered the best interests of the child and found that he is best served staying in private school. The court determined that tutoring and paraprofessional fees should be split between the parties. Given the district court's exposition of its reasons for keeping the children in their current schooling situation, and its superior position to make these fact-specific determinations, we conclude that the district court did not abuse its discretion in ordering each party to pay one half of the tutoring and paraprofessional fees.

Appellant claims that respondent failed to pursue litigation that could have made the issue of paraprofessional fees a moot point by requiring the public school district to pay the fees. He argues that he thus should be relieved of his obligation to pay. But the district court properly found that a child has paraprofessional needs, is best served in private school, and that appellant and respondent should each be responsible for half the cost of fulfilling those needs. As discussed above, this was not an abuse of discretion.

IV.

Appellant argues that the district court abused its discretion by excluding his expert affidavit and related financial documents. We disagree.

A district court has discretion to exclude testimony for failure to timely disclose expert witnesses. *Uselman v. Uselman*, 464 N.W.2d 130, 138 (Minn. 1990), *superseded*

by statute on other grounds, Minn. Stat. § 549.211 (2008). Expert testimony should be suppressed for failure to make a timely disclosure, however, only where the failure is inexcusable and disadvantages the opposing party. *Dennie v. Metro. Med. Ctr.*, 387 N.W.2d 401, 405 (Minn. 1986). The determining issue is whether the opposing party has been prejudiced to an appreciable degree by the late disclosure. *Phelps v. Blomberg Roseville Clinic*, 253 N.W.2d 390, 394 (Minn. 1977).

Here, respondent served interrogatories on appellant months before a scheduled hearing that included a request that appellant identify expert witnesses that he may use at trial and what issues they will address. Appellant never responded to this interrogatory. On August 29, 2008, respondent filed an affidavit in support of her modification motion indicating what she believed to be appellant's income and expenses. On September 10, 2008, five days before the scheduled hearing, appellant submitted his pleadings, which included an affidavit of a financial expert and supporting financial documents. Appellant claims that he submitted the information late because he only realized he needed to retain an expert and provide evidence of his income when he saw respondent's "incorrect" assessment of his financial picture.

The Minnesota Supreme Court has stated that district courts must be given "discretion to determine the sanction appropriate to a violation of the discovery rules, for they are in the best position to assess the degree of prejudice that will arise from the violation and the efficacy of the remedies available that may prevent prejudice from resulting." *Cornfeldt v. Tongen*, 262 N.W.2d 684, 697 (Minn. 1977). Here, despite claims that he did not know he would need a financial expert until he saw respondent's

motion, the record indicates that the hearing was scheduled to address child-support modification, and that child-support obligations are based on the parties' financial situation. We conclude that the district court did not abuse its discretion in excluding the evidence.

V.

After the district court issued its December 15, 2008 order, appellant filed a motion for amended findings. In a February 10, 2009 order, the district court refused to hear the motion. Appellant argues that since he served and filed a timely motion for amended findings, the district court abused its discretion by not hearing it. We disagree.

This court will not disturb a district court's denial of a motion for amended findings or a new trial absent an abuse of discretion. *Zander v. Zander*, 720 N.W.2d 360, 364 (Minn. App. 2006), *review denied* (Minn. Nov. 14, 2006). Upon a timely motion: "the court may amend its findings or make additional findings, and may amend the judgment accordingly if judgment has been entered." Minn. R. Civ. P. 52.02. "May" is permissive, not mandatory. *Friends of Animals and their Env't v. Nichols*, 350 N.W.2d 489, 491 (Minn. App. 1984). Here, the court did not hear and deny the motion; rather it refused to hear the motion at all.

A district court's silence in regard to requested relief can be deemed a denial of such relief, if the record supports a denial. *See, e.g.*, *Hughes v. Sinclair Mktg., Inc.*, 389 N.W.2d 194, 200 (Minn. 1986) (holding that silence was a denial based on the wording of the petition and the court's order); *Cleys v. Cleys*, 363 N.W.2d 65, 72 (Minn. App. 1985) (concluding that silence on the issues of a request for reimbursement and a request

for award of attorney fees could be construed as denials of those requests, where the record would support denial). Similarly, in this case, the district court's refusal to hear the motion for amended findings can be construed as a denial.

Furthermore, when the district court declined to hear appellant's motion, it stated that the matter has been open for six years, generating a 26-volume file "and the parties have spent considerable time and money in litigation. The undersigned has serious concerns regarding whether the amount of time, energy, and money the parties have expended and continue to expend is commensurate with the goals sought and/or achieved." On this record, it is clear that the district court would have summarily denied the motion for amended findings had it been heard. And based on the above discussion, it would have been within the court's discretion and consistent with substantial justice for the court to have done so. Where, as here, the district court has made it clear that it would have denied a motion, and where denying the motion is consistent with substantial justice, the refusal to hear the motion constitutes harmless error. *See* Minn. R. Civ. P. 61 ("no error or defect in any ruling or order or in anything done or omitted by the court . . . is ground for granting a new trial . . . vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice"). We therefore conclude that it was harmless error for the district court to refuse to hear respondent's motion for amended findings.

Affirmed as modified.