**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A10-121**

In re the Marriage of: Shushanie Esther Aschemann,
n/k/a Shushanie Esther Kindseth, petitioner,
Respondent,

vs.

Dan Faith Aschemann,
Appellant.

**Filed January 4, 2011**
**Affirmed in part, reversed in part**
**Minge, Judge**

Hennepin County District Court
File No. 27-FA-07-214

Shushanie E. Kindseth, Minneapolis, Minnesota (pro se respondent)

Dan Faith Aschemann, Minneapolis, Minnesota (pro se appellant)

Considered and decided by Lansing, Presiding Judge; Kalitowski, Judge; and Minge, Judge.

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

**MINGE**, Judge

On appeal in this child-support dispute, appellant-father argues that the district court abused its discretion (1) by modifying his child-support obligation when neither party requested a modification and without making any findings of fact; (2) in calculating his gross monthly income; and (3) by denying his request to suspend his child-support

obligation pending passage of the bar exam. We affirm the district court's calculation of father's gross monthly income and denial of father's request to suspend child support pending passage of the bar exam. But because the district court modified father's child-support obligation without notice to the parties or findings, we reverse in part.

**FACTS**

Appellant-father Dan Faith Aschemann and respondent-mother Shushanie Esther Kindseth married in July 2003 and divorced in March 2008. The parties have two children. Mother graduated from law school in 2003 and has since worked as an attorney. Father graduated from law school in 2004, but failed the Minnesota bar exam three times. During the parties' marriage, father stayed home to take care of the children. Since the parties separated, father has worked as a carpentry subcontractor.

In its March 2008 findings of fact, conclusions of law, order for judgment, and judgment (dissolution decree), the district court granted mother sole legal and physical custody of the children, awarding father unsupervised parenting time. The district court considered mother's income of more than $100,000 per year as an attorney, father's income, and the relative parenting times of the parties, and ordered father to pay, pursuant to the child-support guidelines, a monthly child-support obligation of $1,126. But citing father's need to participate in therapy and his inability to afford it, the district court reduced his support obligation by $300 "[f]or as long as [he] is actively receiving therapy."

Since the dissolution of their marriage, the relationship between the parties has been highly contentious. They have strong differences over religion, child care,

parenting time, and child support and have had numerous court appearances. Father has been in serious default in payment of child support and subject to sanctions.

Shortly after entry of the dissolution decree, father asked the district court to reduce his child-support obligation, asserting that he overstated his income at trial. In May 2008, after father presented his 2007 tax forms and provided further testimony regarding his income in 2008, the district court reduced father's child-support obligation to $682 per month. The district court continued the $300 therapy reduction, resulting in a net obligation of $382 per month.

In September 2008, father moved the district court to further reduce his child-support obligation and to forgive past due child support. In February 2009, the district court applied the child-support guidelines, determined father's presumptive monthly support obligation to be $635, but concluded that "[b]ecause of [father]'s increased expenses for overnight visits and housing, a downward deviation of $150 is appropriate." The district court then reduced father's monthly child-support obligation to $485, with a continuing $300 reduction for therapy resulting in a net obligation of $185 per month.

In November 2009, mother moved the district court, among other things, to eliminate the $300 therapy reduction in father's monthly child-support obligation. Father submitted a responsive motion, requesting, among other things, that the district court suspend his child-support obligation pending passage of the bar exam and forgive past due child support.

Following a hearing, the district court eliminated father's therapy reduction, denied father's request to suspend child support pending passage of the bar exam, and

denied father's request to forgive past due child support. The district court then sua sponte applied the child-support guidelines and set father's support obligation at $635 per month, without including any reference to the $150 per month downward deviation that had been included in the February 2009 order. This appeal follows.

## D E C I S I O N

### I.

The first issue is whether the district court abused its discretion by sua sponte deleting the $150 reduction in father's child-support obligation without any findings. The district court has broad discretion in modifying child-support orders. *Putz v. Putz*, 645 N.W.2d 343, 347 (Minn. 2002). We will reverse a district court's order regarding child support only if the district court "abused its broad discretion by reaching a clearly erroneous conclusion that is against logic and the facts on record." *Id*.

The district court may "from time to time, on motion of either of the parties . . . modify the order respecting the amount of . . . support money." Minn. Stat. § 518A.39, subd. 1 (2008). Generally, the district court's jurisdiction does not extend beyond the power delegated to it by statute. *Gannon v. Gannon*, 258 Minn. 57, 60, 102 N.W.2d 677, 679 (1960). But the district court's jurisdiction in child-support proceedings is equitable in nature, and thus the district court may grant the relief that is required "to justly deal with the interests of the parties." *Scott v. Scott*, 373 N.W.2d 652, 654 (Minn. App. 1985).

The statute provides that a district court may modify a child-support order upon a showing of a substantial change in circumstances that makes the terms unreasonable and unfair. Minn. Stat. § 518A.39, subd. 2 (2008). "Whether there is a substantial change in

circumstances rendering an existing [child] support obligation unreasonable and unfair generally requires comparing the parties' circumstances at the time support was last set or modified to their circumstances at the time of the motion to modify." *Maschoff v. Leiding*, 696 N.W.2d 834, 840 (Minn. App. 2005). A question of changed circumstances which has been litigated once may not be retried on a subsequent motion for modification of child support. *Phillips v. Phillips*, 472 N.W.2d 677, 680 (Minn. App. 1991).

In modifying a child-support order, a district court must make specific findings of fact regarding a substantial change in circumstances that makes the terms of the order unreasonable and unfair. *Allan v. Allan*, 509 N.W.2d 593, 596 (Minn. App. 1993). In *Moylan v. Moylan*, the supreme court reversed the district court's modification order when the district court found that the obligor had a substantial increase in income, but failed to find that the increase rendered the support obligation unreasonable and unfair or to consider the needs of the child. 384 N.W.2d 859, 864-65 (Minn. 1986). The district court may deviate from the presumptive guidelines obligation to "encourage prompt and regular payments of child support and to prevent either parent or the joint children from living in poverty." Minn. Stat. § 518A.43, subd. 1 (2008).

In February 2009, the district court granted father increased parenting time of one additional night per week and applied the child-support guidelines to determine that his presumptive monthly support obligation was $635. Considering a request by father, the district court further concluded that "[b]ecause of [father]'s increased expenses for overnight visits and housing, a downward deviation of $150 is appropriate." Thus, the

district court ordered a monthly child-support obligation of $485 (still subject to the $300 reduction for therapy).

In January 2010, pursuant to the parties' cross-motions, the district court eliminated the $300 per month therapy reduction. That action is not at issue in this appeal. In addition, in the same order the district court sua sponte revisited and recalculated child support. It then applied the guidelines to determine that father's presumptive monthly support obligation was still $635, but omitted the $150 downward deviation that had been ordered less than a year earlier. Thus, the district court's January 2010 order constituted a modification of its February 2009 order. However, the district court did not explicitly state that it was eliminating the $150 per month adjustment, that there was any change in circumstances, that it considered the needs of the children, or that the existing support level was unreasonable and unfair. Further, neither party represented to the district court that there was any change in circumstances or that they were aware that, other than the $300 per month therapy reduction, the amount of the support obligation was at issue.

Mother argues that the district court did not need to make the requisite modification-of-child-support findings because the district court simply followed the guidelines and applied the modification presumption set forth in Minn. Stat. § 518A.39, subd. 2(b)(1). However, the district court did not find a change in the parties' circumstances or income. The basic support level stayed the same. The deletion of the special adjustment is a modification of a prior conclusion of law that a downward deviation was appropriate. To eliminate that adjustment, the district court must provide

some explanation. *Cf. Johnson v. Johnson*, 533 N.W.2d 859, 865 (Minn. App. 1995) ("In determining whether the statutory presumption has been rebutted, the [district] court must evaluate and make findings regarding the custodial parent's circumstances, the obligor's circumstances, and those of the children.").

We do not expect, as a general rule, that district courts must make extensive findings explaining a decision to eliminate an adjustment. But based on this record, when neither party made a modification motion and the district court did not alert the parties that it would revisit basic support levels, making the $150 per month increase without findings of fact supporting the modification is an abuse of discretion. Based on this record, we reverse the elimination of the $150 per month modification.

**II.**

The second issue is whether the district court erred in calculating father's monthly gross income. As stated previously, neither party sought recalculation of basic child support nor redetermination of income and the district court did not change the existing determination of father's income. However, because the dispute over father's income is recurring and because the district court again considered father's income, we will address the matter. The determination of an obligor's income for purposes of child support is a finding of fact that we review for clear error. *See Schallinger v. Schallinger*, 699 N.W.2d 15, 23 (Minn. App. 2005) (making this statement with regard to net income under prior child-support statute), *review denied* (Minn. Sept. 28, 2005).

The statutes define income for purposes of child support. Minn. Stat. §§ 518A.26, subd. 15, .29-.32 (2008). Although for most individuals, income is a simple

determination based on wages, the district court may, in special circumstances, base child support on an obligee's potential income. Minn. Stat. § 518A.32, subd. 1 allows the district court to base support on potential income if there is no direct evidence of income. *See Beede v. Law*, 400 N.W.2d 831, 835 (Minn. App. 1987) ("Use of earning capacity findings normally involves obligors who are self-employed or who have improperly reduced their income."). Minn. Stat. § 518A.32, subd. 2, provides that the district court may determine potential income by one of three methods, including "the amount of income a parent could earn working full time at 150 percent of the current federal or state minimum wage, whichever is higher."

In its March 2008 dissolution decree, the district court found, based on father's testimony, that father's monthly gross income was $3,333. But shortly thereafter, in May 2008, the district court found, based on new evidence, that father's monthly gross income was $1,875, a substantial reduction. Father failed to provide documentary evidence of his income to support his November 2008 motions regarding suspension of child support and forgiveness of past due child support. In February 2009, after father failed to provide any new evidence of income and refused to state his income for 2008, the district court again used a gross monthly income of $1,875 to calculate father's child-support obligation. In its January 2010 order, the district court used a monthly gross income of $1,880 to calculate child support.

Father argues that the district court erred by "imputing" income to him for purposes of applying the child-support guidelines when evidence in the record clearly establishes his income. But father has been deficient in reporting income. Under the

circumstances, the district court's decision setting father's monthly gross income at $1,880 is consistent with the only evidence he has presented to the district court regarding income. At the May 2008 hearing, father stated that his income for 2008 would be between $20,000-$25,000–a monthly average of $1,875. At the February 2009 hearing on his motion to modify, father stated that his income "would probably be what he estimated to the Court in 2008." And at a July 2009 child-support review hearing, father stated that he was working full time, earning $12-$15 per hour. Based on a 2000-hour work year, at $12 per hour, the average monthly income would be $2,000. In its January 2010 order, the district court found that father "is capable of earning at least 150% of minimum wage or $1,880.00 gross per month." Based on this record, we conclude that the district court did not overstate father's income in setting it at $1,880 per month.[1]

**III.**

The third issue is whether the district court abused its discretion by denying father's request to suspend his child-support obligation incident to the July 2010 Minnesota bar exam. Father claims that this is an abuse of discretion, relying on the Minnesota Supreme Court's decision in *Giesner v. Giesner*, 319 N.W.2d 718 (Minn. 1982). In *Giesner*, the district court denied the obligor's request to suspend child-support and spousal-maintenance payments for 8 to 12 months to allow him to start a new business. *Id.* at 719. The supreme court reversed and remanded for the district court to

[1] We note that at various times the district court set father's income at $1,875 per month. Because the $5 difference between this and $1,880 per month is de minimus, we do not consider the discrepancy.

evaluate the obligor's "subjective intent in starting a new business" as well as the other statutory factors for modification. *Id*. at 720. Specifically, the *Giesner* court stated, "If the [district] court finds that the entry into the new business by the [obligor] was made in good faith so that [obligor] might meet his obligations, including his support and maintenance obligations, the court may then fashion a modification that will reflect equities for the parties and the child." *Id*.

Here, unlike in *Giesner*, the district court's findings indicate that it considered father's "subjective intent" in wanting to study for the bar exam, the likelihood that his income would increase upon passage, and his earning capacity without bar passage. The district court noted that father "is an able-bodied individual who has completed college and law school," and that he has failed the bar exam on previous occasions. Although taking a few weeks to prepare for the bar examination is common, this is a limited interruption in father's work year.

We agree with father that the district court had an obligation to consider father's circumstances and arguments. However, it had discretion whether or not a suspension should be granted. Based on this record, we conclude that the district court did not abuse its discretion by denying father's request to suspend child-support payments incident to the July 2010 bar exam.

**Affirmed in part, reversed in part.**

Dated: