

DA 23-0146

IN THE SUPREME COURT OF THE STATE OF MONTANA

2023 MT 163N

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IN RE THE MARRIAGE OF:

JENNIFER BANZET, f/k/a JENNIFER BAILEY,

Petitioner and Appellee,

and

BRIAN BAILEY,

Respondent and Appellant.

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APPEAL FROM: District Court of the Eleventh Judicial District,  
In and For the County of Flathead, Cause No. DR-15-136(A)  
Honorable Amy Eddy, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Brian Bailey, Self-represented, Helena, Montana

For Appellee:

Shelly F. Brander Kaufman Vidal Hileman Ellingson, P.C., Kalispell,  
Montana

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Submitted on Briefs: August 9, 2023

Decided: August 29, 2023

Filed:

  
Clerk

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Justice Ingrid Gustafson delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court Internal Operating Rules, this case is decided by memorandum opinion and shall not be cited and does not serve as precedent. Its case title, cause number, and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.

¶2 Respondent and Appellant Brian Bailey (Brian) appeals the Order Re: Respondent's Motions issued October 21, 2022, and the Order Awarding Attorney's Fees issued February 1, 2023, by the Eleventh Judicial District Court, Flathead County. Brian argues the District Court did not equitably apportion the marital estate, failed to take the actual situation of the parties into account in calculating child support, and erred in awarding Petitioner and Appellee Jennifer Bailey (Jennifer) attorney fees. Jennifer maintains the District Court correctly enforced the provisions of the parties' Settlement Agreement (in Cause No. DV 19-505(D)) and Stipulation to Amend PSA (in this case) with regard to the division of marital property and child support. We affirm.

¶3 The parties' original dissolution decree incorporated the parties' Stipulated 2016 Property Settlement Agreement (2016 PSA) and Child Support Agreement (CSA). Pursuant to the 2016 PSA, Brian retained Bailey Insurance Services, LLC, (Bailey Insurance) as his sole and separate property. Pursuant to the CSA, Brian was required to pay \$4,166.66 per month in child support, provide for the children's health insurance and private school tuition, and pay Jennifer \$7,500 per month in spousal maintenance. On

November 30, 2018, the parties entered into an agreement transferring Bailey Insurance from Brian to Jennifer in exchange for Jennifer paying Brian \$50,000 per year for 15 years. The agreement also provided that Jennifer would assume the obligations to provide for the children's health insurance and school tuition and Brian would be relieved of all child support and spousal maintenance obligations.

¶4 Thereafter, Brian disputed the validity of the November 30, 2018 agreement, which led to Jennifer filing a separate lawsuit, in Cause No. DV 19-505(D), seeking a declaratory judgment that the agreement was valid and she was the sole owner of Bailey Insurance. Brian counterclaimed asserting he did not recall signing the agreement and likewise asserting he was the sole owner of Bailey Insurance.<sup>1</sup> Ultimately, on December 31, 2019, the parties executed a Settlement Agreement and Release (SA) resolving all claims and counterclaims in Cause No. DV 19-505(D).<sup>2</sup> Pursuant to the SA, Jennifer received 100% ownership of Bailey Insurance in exchange for \$819,000, Brian's obligation to provide the children with health insurance and pay the children's school tuitions was transferred to Jennifer, and Brian's obligation to provide further spousal maintenance was eliminated. The SA also provided that from the date of the SA forward the parties would abide by the

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<sup>1</sup> This is a broad, non-detailed summary of the substance of the litigation in Cause No. DV 19-505(D) merely to provide context.

<sup>2</sup> Brian asserts the SA to be unconscionable and further asserts that when he signed the Stipulation to Dismiss with Prejudice in Cause No. DV 19-505(D) he was "unaware of damage and lack of recourse that would later cause." Brian is unable to seek a determination of unconscionability or appeal the validity of documents he signed in the separate legal proceeding, Cause No. DV 19-505(D), in this appeal. As such, we do not address these assertions.

terms of paragraph 4 concerning payment of child support. Paragraph 4 of the SA provided for the parties to open a case with the Child Support Services Division (CSSD)<sup>3</sup> and that CSSD would then calculate Brian’s child support obligation to begin January 1, 2020. In calculating Brian’s child support, CSSD would do so without including as income the amounts paid to Brian for Bailey Insurance. Finally, the SA provided for a release of all claims “asserted or that could have been asserted” in Cause No. DV 19-505(D).

¶5 On January 6, 2020, the parties signed and filed a Stipulation to Amend Marital and Property Settlement Agreement (Amended PSA) which reiterated the provisions of the SA—Jennifer’s ownership of Bailey Insurance in exchange for payment to Brian of \$819,000. The District Court approved the Amended PSA on March 10, 2020. Jennifer opened a case with CSSD. Brian did not seek recalculation of his child support obligation by CSSD but ceased paying child support after November 2018. After Jennifer had opened the CSSD case, CSSD issued its Final Order Regarding Income Withholding on November 9, 2021, which required Brian to pay child support from December 2018 to the present. On May 5, 2022, Brian filed an ex parte motion seeking recalculation of child support as of January 1, 2019, transfer of his health insurance obligations to Jennifer effective January 1, 2019, waiver of all past due child support, a stay of CSSD’s income withholding, and modification of the Amended PSA. Shortly thereafter, Brian also sought a contested hearing on his motion. On October 21, 2022, the District Court denied Brian’s

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<sup>3</sup> At the time known as the Child Support Enforcement Division. In 2020, the division was renamed to CSSD.

motion for a contested hearing, to waive past due child support, and to stay the income withholding imposed by CSSD. The District Court denied modification of the Amended PSA as it was resultant from the SA in Cause No. DV 19-505(D) and, as Brian agreed to release any claim relating to Cause No. DV 19-505(D), he was precluded from bringing claims of alleged fraud regarding the Amended PSA. The District Court ordered Brian was obligated to pay child support arrearages of \$4,166.66 per month from December 2018 through December 2019. Finally, the District Court ordered that CSSD recalculate Brian's child support retroactive to January 1, 2020, and that Brian then pay the recalculated amount from January 1, 2020, to present.

¶6 On December 12, 2022, the District Court issued its Order granting Jennifer her attorney fees and requiring that within ten days she submit an affidavit establishing her reasonable attorney fees. Brian was then permitted ten days after submission of Jennifer's affidavit of reasonable attorney fees to submit objections to any of the fees claimed. Jennifer timely filed an affidavit of reasonable attorney fees. Brian failed to file any objection thereto. As such, on February 1, 2023, the District Court awarded Jennifer her total claimed attorney fees of \$11,836.25.

¶7 The construction and interpretation of a written agreement are questions of law. *In re Marriage of Simpson*, 2018 MT 281, ¶ 10, 393 Mont. 340, 430 P.3d 999 (citation omitted). "The terms of a separation agreement 'are enforceable as contract terms.'" *In re Marriage of Toenjes*, 2018 MT 189, ¶ 11, 392 Mont. 230, 422 P.3d 1215 (quoting § 40-4-201(5), MCA). "We interpret contracts 'to give effect to the mutual intention of

the parties as it existed at the time of contracting.’” *In re Marriage of Toenjes*, ¶ 11 (quoting § 28-3-301, MCA). We review a district court’s conclusions of law for correctness, and a district court’s findings of fact for clear error. *In re Marriage of Simpson*, ¶ 10. We review determination as to the modification of marital property settlement agreements and child support, including retroactive child support, for an abuse of discretion. *In re Marriage of Miller*, 2022 MT 110, ¶ 14, 409 Mont. 29, 511 P.3d 307 (citations omitted). A district court abuses its discretion if it “acted arbitrarily without employment of conscientious judgment” or “exceeded the bounds of reason resulting in substantial injustice.” *In re Marriage of Simpson*, ¶ 10 (citation omitted). A court’s determination as to which party is the prevailing party for attorney fee purposes is a question of law which we review for correctness. *In re Marriage of Damschen*, 2011 MT 297, ¶ 39, 363 Mont. 19, 265 P.3d 1245 (citations omitted). An award of attorney fees is reviewed under the abuse of discretion standard. *In re Marriage of Simpson*, ¶ 10.

¶8 Brian raises several issues on appeal. We address each in turn.

¶9 First, Brian asserts the District Court erred by denying his Motion for Contested Hearing. From our review of the record, the District Court did not abuse its discretion when it determined an evidentiary hearing was not necessary. The District Court specifically considered that, from Brian’s declaration and Jennifer’s affidavit, “[t]he facts are generally undisputed . . . or otherwise not contested” such that a hearing was not necessary. Brian has not shown otherwise. The District Court’s decision not to hold an

evidentiary hearing was not arbitrary and did not exceed the bounds of reason and was thus not an abuse of discretion.

¶10 Second, Brian argues the court erred when it denied his request to modify the parties' stipulated distribution of marital assets. Brian argues the court erred when making an equitable distribution of property pursuant to the 2016 PSA, by failing to weigh the equitable distribution of assets pursuant to § 40-4-202(1), MCA. Brian either misunderstands this statutory provision or inappropriately seeks untimely appeal of the parties' original dissolution decree.<sup>4</sup> Section 40-4-202, MCA, does not apply to modifications of separation agreements post dissolution, but rather provides the consideration a court must make upon an initial dissolution proceeding. Section 40-4-208, MCA, pertains to post-dissolution modifications of property and child support. Post dissolution, Brian sought to modify the Amended PSA, which incorporated the terms of the SA in Cause No. DV 19-505(D). Section 40-4-208(3), MCA, provides two means by which a court may modify a decree as to property disposition: (1) upon written consent of the parties, or (2) upon the court finding the existence of conditions that justify reopening of a judgment. In its October 21, 2022 Order, the District Court acknowledged its March 3,

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<sup>4</sup> In 2016, the District Court issued a Decree which dissolved the parties' marriage and incorporated the provisions of their 2016 PSA, specifically finding the 2016 PSA, "equitably divides the parties' assets and liabilities, and is neither unreasonable nor unconscionable." Brian did not appeal the Decree. The October 21, 2022 Order from which Brian appeals did not apportion the marital estate—that was done at the time of the original dissolution decree. As such, Brian is precluded from now claiming the District Court failed to consider the factors set forth in § 40-4-202, MCA, when the court approved and adopted the parties' 2016 PSA.

2020 Order<sup>5</sup> modified the original 2016 PSA, adopting the Amended PSA executed by the parties based on their written consent and further determined it could not further modify the Amended PSA without Jennifer’s consent unless Brian demonstrated the agreement to be unenforceable. Clearly, Jennifer did not consent to further amendment and, from our review of the record, Brian cited no authority or admissible evidence that his execution of the SA in Cause No. DV 19-505(D) and of the Amended PSA was the product of undue influence, duress, or mental incapacity.<sup>6</sup> As such, we find no error in the District Court’s determination that the Amended PSA was binding on the District Court’s adjudication of Brian’s ex parte motion to modify the marital and property settlement agreement.

¶11 Third, Brian disputes the District Court’s calculation of child support and its determination of the effective date of the retroactive modification of child support. Generally, a court may not retroactively modify child support payments and may only modify child support prospectively. *In re Marriage of Hooper*, 247 Mont. 322, 324, 806 P.2d 541, 543 (1991); *see also* § 40-4-208(1), MCA (“[A] decree may be modified by a court as to support only to installments accruing subsequent to actual notice of the parties

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<sup>5</sup> Brian has not appealed the March 3, 2020 Order.

<sup>6</sup> Instead, it appears Brian was not content with the denial of his request for temporary injunction in Cause No. DV 19-505(D). Rather than appeal that determination, however, Brian agreed to settle that case—executing the SA which resolved all claims and released further claims between the parties, including claims of alleged fraud and claims relating to the sale of the Bailey Insurance business. Brian’s discontent with the outcome of Cause No. DV 19-505(D) does not establish any wrongful acts on Jennifer’s part resulting in duress or undue influence upon Brian, does not establish Brian did not have adequate legal remedy to protect his interests, and does not show how denial of his request for temporary injunction constituted duress or undue influence. Further, Brian failed to demonstrate he lacked the mental capacity to enter into either the SA or the Amended PSA.



of the motion for modification.”). Brian sought retroactive modification to January 2019, when the parties originally agreed to the SA.<sup>7</sup> In its October 21, 2022 Order the District Court concluded that as Jennifer agreed to retroactive modification of Brian’s child support as of January 1, 2020, equitable estoppel allowed for such. Thus, the District Court permitted CSSD to recalculate child support and then retroactively modify it to be effective January 1, 2020, and thereafter.<sup>8</sup> Brian does not dispute the propriety of retroactive modification of child support but asserts the appropriate date for such to be January 2019, not January 2020. However, the specific terms of the parties’ SA provided January 1, 2020, to be the effective date of the recalculation of child support. The SA is an enforceable contract between the parties and we find no error by the District Court in enforcing the terms of that agreement.

¶12 Fourth, Brian asserts the District Court erred in denying Brian’s ex parte motion to waive his entire past due child support, including arrearages before and after January 1, 2020, and to stay income withholding. Brian now asserts, per the parties’ SA, his child support obligation was waived prior to January 1, 2020. The language of the SA does not specifically waive Brian’s child support obligation, but merely provides the parties will open a case with CSSD for the purpose of calculating Brian’s child support obligation as of January 1, 2020. At the time the parties entered into the SA, the CSA required Brian to

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<sup>7</sup> The SA, however, specifically provides for recalculation of Brian’s child support obligation effective January 1, 2020.

<sup>8</sup> Contrary to Brian’s assertion, the District Court did not calculate child support, CSSD did.

pay \$4,166.66 per month in child support. Given the existence of a current support order at the time the parties entered into the SA together with the lack of specific waiver of child support prior to January 1, 2020, the District Court correctly interpreted the SA to merely provide for recalculation of Brian's child support obligation as of January 1, 2020, and properly enforced the agreement.

¶13 Finally, Brian asserts various errors by the District Court with regard to its award of attorney fees to Jennifer—arguing the award was made outside the 14-day period provided in M. R. Civ. P. 54(d)(2)(B)(i); the District Court abused its discretion when it awarded Jennifer fees without a clear explanation; and Jennifer's motion seeking attorney fees was part of a plan to delay this Court's review. Brian's assertion that the attorney fee award was made outside the 14-day requirement of Rule 54(d)(2)(B)(i) has no merit. Rule 54(d)(2)(B)(i) provides that a motion for attorney's fees must "be filed no later than 14 days after the entry of judgment[.]" As of November 18, 2022, when Jennifer filed her motion seeking attorney's fees, the District Court had not yet entered judgment.<sup>9</sup> Notice of entry of judgment did not occur until February 2, 2023, after the court issued its December 12, 2022 and February 1, 2023 orders granting and awarding Jennifer fees.

¶14 Brian's next assertion, citing M. R. Civ. P. 54(d)(2)(B)(ii), that the court awarded Jennifer fees without a clear explanation likewise has no merit. Rule 54(d)(2)(B)(ii) requires that when a party makes a motion for attorney fees, the party must "specify the judgment and the statute, rule, or other grounds for entitling the movant to the award."

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<sup>9</sup>The October 21, 2022 Order did not address Jennifer's motion seeking attorney's fees.

Rule 54(d)(2)(B)(ii) does not apply to a court's order awarding fees. Further, the District Court was not required, pursuant to M. R. Civ. P. 52(a)(3), to state findings or conclusions in its October 21, 2022 Order addressing Brian's ex parte motions.

¶15 Brian asserts Jennifer filed her motion seeking attorney's fees as part of a plan of delay to punish Brian. At best, this assertion is mere speculation. Well within the time requirements of Rule 54(d)(2)(B)(i), Jennifer sought recovery of her attorney fees incurred in defending against Brian's ex parte motions. Pursuant to the requirements of Rule 54(d)(2)(B)(ii), she asserted the grounds entitling her to recover her attorney fees—that the SA and the Amended PSA contained attorney fee provisions allowing the prevailing party to recover attorney fees and she was the prevailing party. From our review of the record, there can be no legitimate dispute that Jennifer was the prevailing party. Further, from our review of the record, the disputes asserted in Brian's ex parte motions were related to the provisions and obligations of the SA and the Amended PSA, both of which contained provisions permitting recovery of attorney fees to the prevailing party. Thus, we find no error with the District Court's award of reasonable attorney fees to Jennifer. Regarding the particular fees claimed in its December 12, 2022 Order Granting Petitioner Attorney's Fees, the District Court gave Jennifer ten days to submit an affidavit of reasonable attorney fees and provided Brian ten days after submission of such affidavit "to submit any objections to [Jennifer's] claimed attorney's fees." Jennifer timely submitted her affidavit outlining her claim of reasonable attorney's fees in the amount of \$11,836.25. Brian did not file any objection to Jennifer's claimed attorney's fees. Issues not raised below will

not be considered for the first time on appeal. *Unified Indus., Inc. v. Easley*, 1998 MT 145, ¶ 15, 289 Mont. 255, 961 P.2d 100. Thus, to the extent Brian now objects to any of the claimed attorney's fees, he has waived this issue for appeal.<sup>10</sup>

¶16 In sum, the District Court properly interpreted and enforced the parties' SA in Cause No. DV 19-505(D) and the Amended PSA herein. The District Court did not abuse its discretion in denying Brian's motion to modify the marital property division or in permitting CSSD to recalculate Brian's child support obligation and modifying it retroactively to January 1, 2020. Finally, the District Court correctly awarded attorney fees to Jennifer and did not abuse its discretion in determining the reasonableness of the claimed fees.

¶17 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. This appeal presents no constitutional issues, no issues of first impression, and does not establish new precedent or modify existing precedent.

¶18 Affirmed.

/S/ INGRID GUSTAFSON

We concur:

/S/ MIKE McGRATH  
/S/ LAURIE McKINNON  
/S/ BETH BAKER  
/S/ DIRK M. SANDEFUR

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<sup>10</sup> Jennifer asserts she is also entitled to an award of attorney's fees pursuant to § 37-61-421, MCA, as Brian vexatiously multiplied the litigation and continued to do so. As we have determined Jennifer was entitled to the attorney fees awarded to her, we need not consider this issue.