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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A13-0702**

In re the Marriage of:  
Marcia Lynn Graybow, petitioner,  
Respondent,

vs.

Steven Harlan Graybow,  
Appellant.

**Filed January 13, 2014  
Affirmed  
Rodenberg, Judge**

Hennepin County District Court  
File No. 27-FA-000268968

Kathryn M. Lammers, Heimerl & Lammers, Minneapolis, Minnesota (for respondent)

Matthew J. Gilbert, Gilbert Law Office, PLLC, Minneapolis, Minnesota (for appellant)

Considered and decided by Rodenberg, Presiding Judge; Larkin, Judge; and Chutich, Judge.

**UNPUBLISHED OPINION**

**RODENBERG**, Judge

Appellant Steven Harlan Graybow challenges the district court's denial of his motion to modify his spousal-maintenance and child-support obligations. We affirm.

## FACTS

This is the second appeal from orders concerning appellant's serial motions to modify his spousal-maintenance and child-support obligations as established in the parties' 2001 stipulated divorce decree. The first appeal was taken from a district court order dated August 30, 2011. That order denied appellant's request to modify spousal maintenance but granted his request to modify child support. It also removed appellant's obligation to pay for certain of respondent Marcia Lynn Graybow's medical and other expenses. The factual background and disposition of the prior appeal are set forth in our prior opinion, *Graybow v. Graybow*, No. A12-0249, 2012 WL 6097137 (Minn. App. Dec. 10, 2012).

Since the first appeal, appellant has continued to sell phone, cable, and internet services for telecommunications providers. In early 2012, Integra Communications, one of appellant's vendors, reduced appellant's commissions from 15% to 8%, which decreased appellant's income. While the first appeal was pending, appellant again moved the district court on October 12, 2012 to modify spousal maintenance and child support, asserting that appellant's decrease in income, combined with an increase in his monthly expenses, resulted in a substantial change in circumstances that rendered his existing obligations unreasonable and unfair. *See* Minn. Stat. § 518A.39, subd. 2 (2012). Appellant requested that the district court increase his child-support obligation and decrease his spousal-maintenance obligation. Respondent filed a responsive motion, seeking to hold appellant in constructive civil contempt of court for nonpayment of his

spousal-maintenance obligation. The district court held an evidentiary hearing on December 17, 2012.<sup>1</sup>

At both the district court and on appeal, the parties disagree (among other things) on whether the original 2001 decree or the August 30, 2011 order should be used to determine whether there has been a substantial change in circumstances under Minn. Stat § 518A.39, subd. 2. At the time of the original decree, the parties agreed that appellant's average net monthly income was approximately \$7,000, and that his monthly expenses were approximately \$4,000. The district court's 2011 order found appellant's gross monthly income<sup>2</sup> to be \$13,022 and reasonable monthly expenses to be \$7,000.

The evidence establishes and the district court found that appellant's commissions have been reduced in the past and that his income as a commission-based earner has fluctuated over the years. Appellant submitted evidence to the district court that his gross monthly income from January 2012 through April 2012 averaged \$17,941 and that, after the reduction of his Integra commission percentage, his gross monthly income from May 2012 through September 2012 averaged \$10,392. Appellant's average gross monthly income for those nine months is approximately \$13,747.<sup>3</sup> Appellant also submitted evidence to the district court that his reasonable monthly expenses are \$6,085 per month.

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<sup>1</sup> Our opinion in the first appeal was released between the date on which appellant's motion papers were served and the hearing date.

<sup>2</sup> Comparing net income with gross income is not helpful when determining whether there has been a substantial change in circumstances, absent evidence allowing for meaningful comparison of the data. Appellant suggests we should assume a 30-percent tax rate in order to make a comparison. Determining the effective tax rate is unnecessary in resolving this appeal, as discussed below.

<sup>3</sup>  $((4 * \$17,941 + 5 * \$10,392) / 9)$ .

The district court denied appellant's motion for modification, stating:

[Appellant] has not met his burden to demonstrate a substantial change in circumstances renders the existing order unfair and unreasonable. . . . [Appellant] painted an incomplete and unpersuasive record of his finances and his business opportunities such that the court is unable to conclude that the existing obligations are unfair and unreasonable. While [appellant's] income over the last several months has decreased, the court is unable to determine whether, given the fluctuating nature of his business, he has sustained a permanent reduction in income that is due to market forces and not his lack of efforts to sustain his business and new business.

The district court also found appellant to be in constructive contempt of court for failing to pay his spousal maintenance as ordered. It also awarded respondent need-based attorney fees. Appellant initially appealed all of these determinations but withdrew his challenges to the finding of contempt and the award of attorney fees.

## **D E C I S I O N**

The district court has broad discretion to determine whether to modify an existing child-support or spousal-maintenance obligation. *Haefele v. Haefele*, 837 N.W.2d 703, 708 (Minn. 2013) (child support); *Hecker v. Hecker*, 568 N.W.2d 705, 709-10 (Minn. 1997) (spousal maintenance). “A district court abuses its discretion when it resolves a matter in a manner that is against logic and the facts on record.” *Youker v. Youker*, 661 N.W.2d 266, 269 (Minn. App. 2003) (quotation omitted), *review denied* (Minn. Aug. 5, 2003). Stated another way, a district court abuses its discretion when its findings of fact are unsupported by the record or when it improperly applies the law. *Dobrin v. Dobrin*,

569 N.W.2d 199, 202 & n.3 (Minn. 1997) (citing *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988)).

“A party moving to modify an award of maintenance bears the burden of showing a substantial change of circumstances since the last time maintenance was modified, or if maintenance has not been modified, since it was originally set.” *Youker*, 661 N.W.2d at 269; *see also* Minn. Stat. § 518A.39, subd. 2(a) (explaining that a spousal-maintenance or child-support order may be modified “upon a showing of” enumerated circumstances). After carrying this initial burden, “[t]he moving party must then demonstrate that these changed circumstances render the original award unreasonable and unfair.” *Youker*, 661 N.W.2d at 269. A substantial change in circumstances may arise from a substantial decrease in income of the obligor or a substantial increase in need of the obligor. Minn. Stat. § 518A.39, subd. 2(a)(1), (a)(2). There is a presumption of a substantial change in circumstances when “the gross income of an obligor . . . has decreased by at least 20 percent through no fault or choice of the party.” *Id.*, subd. 2(b)(5).

Appellant raises several issues on appeal, most of which can be grouped under two broad headings: (1) the district court abused its discretion in concluding that appellant’s decrease in income and increase in expenses were insufficient to constitute a substantial change in circumstances, and (2) the district court abused its discretion by failing to consider the statutory factors regarding an initial award of spousal maintenance contained in Minn. Stat. § 518.552, subd. 2 (2012).<sup>4</sup> He also argues for the first time on appeal that

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<sup>4</sup> Appellant also argues that the district court should have modified his spousal-maintenance and child-support obligations because they were “unreasonable and unfair at

his child-support obligation should be reduced due to the emancipation of the eldest joint child. We address each argument in turn.

Appellant argues that the district court abused its discretion in concluding that he failed to demonstrate that the combination of a decrease in income and increase in expenses constitutes a substantial change in circumstances that makes his spousal-maintenance and child-support obligations unreasonable and unfair. *See* Minn. Stat. § 518A.39, subd. 2(a)(1), (a)(2). He also argues that the district court should have applied the statutory presumption of changed circumstances due to a greater-than-20-percent reduction in his gross income. *See id.*, subd. 2(b)(5). Appellant’s arguments are founded on his contentions that “[t]he district court found that his gross income had decreased . . . to \$10,392 per month” and that “the district court found that appellant had monthly expense[s] of \$6,085.” We do not agree that the district court made those findings.

With regard to income, the district court stated:

[Appellant] submitted his gross income for calculating support from January 2012 to September 2012. His [gross] monthly income from January 2012 to April 2012, prior to losing the Integra account, averaged \$17,941. From May 2012 to September 2012, his [gross] monthly income averaged \$10,392. The court received no income information from [appellant] for October 2012 to December 2012.

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[their] inception.” Although the terms of the original 2001 decree appear onerous, appellant agreed to those terms by stipulation, and we cannot revisit that issue in this appeal. *See* Minn. Stat. § 518.145, subd. 2 (2012) (setting forth permissible situations to reopen a divorce decree and the statutes of limitations for each). Appellant has not moved to reopen the original 2001 decree under section 518.145, subdivision 2.

Appellant construes the above language as a finding that his gross monthly income dropped to \$10,392. But the district court did not find either the four-month average of \$17,941 or the five-month average of \$10,392 to be appellant's "gross monthly income" for purposes of determining spousal maintenance and child support. The above-quoted language was the district court's summary of appellant's evidence. *See Dean v. Pelton*, 437 N.W.2d 762, 764 (Minn. App. 1989) (holding that factual findings must be affirmatively stated as findings of the district court). The district court observed the "fluctuating nature" of appellant's income and noted that "no bank statements or financial records" were presented at the evidentiary hearing. It also noted that appellant "has lost commission income in the past" and that he did not demonstrate or prove the efforts he has made to compensate for the reduction in his Integra commissions. In context, the above-quoted language supports the district court's conclusion that appellant has failed to prove any sustained reduction in his income. The district court did not deny appellant's motion because it found the difference between \$17,941 and \$10,392 to be insubstantial. Rather, the district court denied the motion because appellant failed to prove a substantial change in income under Minn. Stat. § 518A.39, subd. 2(a)(1).

At times, appellant argues that his income decreased from \$17,941, which appellant claimed as his gross monthly income from January to April 2012; at other times, he argues that it decreased from \$13,022, which is what the district court found to be his gross monthly income at the time of its 2011 order. The first comparison fails because the district court must look to the circumstances in effect at the time of dissolution or the last time maintenance was modified. *Youker*, 661 N.W.2d at 269.

There is no authority for the proposition that a moving party's present income should be compared to a date or period of time selected by the moving party, when that selected time period is unrelated to any prior court order.

The proposed comparison to the \$13,022 gross monthly income figure in the 2011 order also fails because, even using appellant's own calculations, his year-to-date gross income for 2012 was a *higher* average monthly income than that recited in the 2011 order. The district court was not convinced that appellant had suffered a permanent reduction in his gross income. And we note that gross income may be calculated on a yearly basis, rather than on a monthly basis. Minn. Stat. §§ 518A.26, subd. 8, .29(d) (2012). Appellant's average gross monthly income between January and September 2012 increased from the amount determined by the 2011 order. Appellant cites no authority, and we are aware of none, prohibiting the district court from considering periods of time longer than a few months in determining whether there has been a substantial change in circumstances. That is what the district court did.

Appellant argues that "[t]he district court abused its discretion by assuming appellant's substantial reduction in income was temporary" and the district court should not have required appellant to prove that his income reduction was permanent. Again, the district court did no such thing. It found that appellant had failed to carry his burden of showing a substantial change in circumstances. Based on the fluctuating nature of appellant's income, the district court's finding that appellant's representations were "incomplete and unpersuasive," and the fact that appellant's commissions have been reduced in the past, the district court acted within its discretion in concluding that

appellant had failed to demonstrate any substantial change in income sufficient to warrant modification. The district court considered periods of time longer than individual calendar months, and good reasons exist for it to have done so.

Appellant likewise argues that his expenses have increased substantially, relying on the district court's purported "finding" that his reasonable monthly expenses are \$6,085, which is an increase from the \$4,000 monthly expenses figure in the original 2001 decree. The district court summarized appellant's evidence: "[Appellant] submitted that his monthly expenses on average . . . are approximately \$6,085." But the district court also noted that appellant had "painted an incomplete and unpersuasive record of his finances." It found that appellant has the "resources to continue to play golf, make payments on an insurance policy involving his mother, and other expenses that apparently take priority to him over his maintenance obligation."

As with his income arguments, appellant again proceeds on a misunderstanding or misstatement of the district court's findings. *See Dean*, 437 N.W.2d at 764 (holding that factual findings must be affirmatively stated as findings of the district court). The 2011 order found appellant's reasonable monthly expenses to be \$7,000. Appellant uses the 2011 order as the benchmark against which to measure whether there has been a decrease in his income.<sup>5</sup> And if we use the benchmark of August 30, 2011, appellant's monthly expenses have *decreased* from \$7,000 to \$6,085. The district court did not abuse its

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<sup>5</sup> Appellant's brief reads: "The [district] court erred in failing to modify appellant's spousal-maintenance obligation because of his 52% increase in his monthly expenses *from the date the Judgment and Decree was entered* and appellant's 25.2% reduction in income *since the last support order*."

discretion in determining that there has not been a substantial increase in appellant's expenses.

Appellant also argues that the district court erred in failing to analyze the factors set forth in Minn. Stat. § 518.552, subd. 2. When determining an initial award of spousal maintenance, a district court must consider these factors. Minn. Stat. § 518.552, subd. 1 (2012) (stating that these factors should be considered “[i]n a proceeding for dissolution of marriage”). Appellant argues that the district court must also analyze these factors in ruling on a motion for modification of spousal maintenance. *See* Minn. Stat. § 518A.39, subd. 2(d) (“On a motion for modification of maintenance . . . the court *shall* apply . . . the factors for an award of maintenance under section 518.552 that exist at the time of the motion.” (emphasis added)). But those factors are considered only after a finding that there has been a substantial change in circumstances warranting modification. *See Lee v. Lee*, 749 N.W.2d 51, 59 (Minn. App. 2008) (“Once a maintenance obligor establishes entitlement to modification of a maintenance order, the court must [consider the factors in Minn. Stat. § 518.552, subd. 2].” (citing *Kemp v. Kemp*, 608 N.W.2d 916, 921 (Minn. App. 2000))), *rev'd on other grounds*, 775 N.W.2d 631 (Minn. 2009); *see also Dougherty v. Dougherty*, 443 N.W.2d 193, 194 (Minn. App. 1989) (stating that the factors in Minn. Stat. § 518.552, subd. 2, should be considered “[i]f modification is warranted”). Because the district court found that appellant did not show a substantial change in circumstances, it was not required to weigh any of the factors in section 518.552, subdivision 2.

Properly read, the district court's findings are not erroneous. The findings are well supported by the record. The district court was within its discretion in concluding that

appellant had not met his burden of proving a substantial change in circumstances based on a decrease in income and an increase in expenses, considered singly or in combination. *See Youker*, 661 N.W.2d at 269. It was therefore not obligated to consider the factors set forth in section 518.552, subdivision 2. *See Lee*, 749 N.W.2d at 59.

Appellant argues that the district court abused its discretion by not decreasing his child-support obligation based on the emancipation of a joint child. But appellant's motion to the district court did not ask that his child-support obligation be reduced due to the emancipation of a joint child. He argued to the district court that his child-support obligation should be *increased* from \$1,269 per month to \$1,599 per month to coincide with the requested decrease in spousal maintenance. Therefore, this issue is not properly before us. *See Thiele v. Stitch*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that appellate courts should not address issues that were not first argued to and decided by the district court).<sup>6</sup> We also do not reach the parties' other arguments regarding appellant's child-support obligation, such as respondent's contention that she is entitled to a caretaker exception under Minn. Stat § 518A.32, subd. 5 (2012), as the issues were not preserved for appeal. *See id.*

Appellant's motion required him to prove a substantial change in circumstances. Minn. Stat. § 518A.39, subd. 2. The district court did not abuse its discretion in concluding that he had not carried his burden of proof. The district court did not err in

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<sup>6</sup> We also note that, since the filing of this appeal, the district court has decreased appellant's monthly child-support obligation based on the emancipation of the eldest joint child. *See Evans v. Blesi*, 345 N.W.2d 775, 780 (Minn. App. 1984) (allowing us to take cognizance of this order "for the insight it affords"), *review denied* (Minn. June 12, 1984).

denying appellant's motion to modify his existing spousal-maintenance and child-support obligations.

**Affirmed.**