

NO. A06-1864

State of Minnesota
In Court of Appeals

In Re the Matter of:

Lori Ann Frank-Bretwisch, petitioner,
Respondent,

vs.

William Ryan, respondent,
Appellant.

RESPONDENT'S BRIEF AND APPENDIX

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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LEGAL ISSUES

- I. May a party who has resolved custody and child support by agreeing to accept less than guideline child support modify the child support order by bringing a motion less than six months later claiming facts that were part of the record constitute a substantial change of circumstances which render the prior support unreasonable and unfair?

The District Court found that Appellant failed to meet his burden of showing a substantial change in circumstances had occurred because of Respondent's receipt of bonuses, where Appellant had agreed to a downward departure in child support based on Respondent's base income and with full knowledge that Respondent received periodic bonuses and after he had already started incurring expenses as a custodial parent.

Minn. Stat. § 518.64, subd. 2(a)

McNattin v. McNattin, 450 N.W.2d 169 (Minn. App. 1990)

Bormann v. Bormann, 644 N.W.2d 478 (Minn. App. 2002)

O'Donnell v. O'Donnell, 678 N.W.2d 471 (Minn. app. 2004)

- II. May a party who has resolved custody and child support by agreeing to accept less than guideline child support seek to modify the order under Minn. Stat. § 518.64 after the time for appeal from the original order has expired, claiming that the order lacked findings to support the deviation and that the court was required to make findings regarding the best interest of the child?

The District Court refused to review the propriety of the prior court order.

Minn. R. Civ. App. P. 104.01

Minn. R. Civ. P. 60.01

Reid v. Strodtman, 631 N.W.2d 414 (Minn. App. 2001)

STATEMENT OF FACTS

On August 26, 2005, in lieu of proceeding with an evidentiary hearing on the motion of Appellant, William Ryan [hereinafter Father] to modify custody, Father and Respondent, Lori Ann Frank-Bretwisch [hereinafter Mother] agreed to a compromise wherein Father would be granted physical custody of the minor child and Mother would pay child support of \$350 per month. (Respondent's Appendix [hereinafter Resp. A-] p. 2, line 3 - p. 4, line 10; Appellant's Appendix [hereinafter App. A-] pp. 20-23).

The agreed child support was a deviation downward from the guidelines. (Resp. A-4, lines 8-10). Both parties were represented by counsel, and the parties' agreement and their financial circumstances were recited into the record in the presence of both parties. (Resp. A-2, lines 8-11, Resp. A-4, line 10 - A-5, line 7). During the lengthy history of this case, mother's compensation, including her receipt of periodic bonuses, has been addressed repeatedly. (App. A-12-14, paras. 27-47).

Notably absent from Father's Statement of the Facts is the undisputed fact that Mother's counsel read the following into the record at the August 2005 hearing:

"The child support amount will be \$350.00 per month which is a downward departure. Ms. Frank-Bretwisch's net monthly income is \$4,396 per month. That is set forth in the Findings of Fact, Conclusions of Law and Order covered by Magistrate Pasteur [phonetic] on May 26, 2005. She, also, receives periodic bonuses which are not guaranteed based upon company and individual performance."

(Resp. A- 4, lines 8-15). Mother receives notification of the discretionary bonuses in October or November, and receives the bonus late in the third quarter or early in the fourth quarter. (Tr. p. 72, lines 14-24).

Father brought a motion pursuant to Minn. Stat. § 518.64 to modify the child support less than six months later, asking the Court to include Mother's bonus in her income and determine that receipt of a bonus represented a change in circumstances which made the current child support unreasonable and unfair. (Transcript of March 14, 2006 hearing [hereinafter Tr.] p. 5, lines 7-11; Appellant's Brief [hereinafter App. B.] p. 9, 12).

The court denied Father's motion, finding that he had failed to meet his burden of proving a substantial change in circumstances.

(App. A-16, para. 75). The court rejected Father's claim that he was not aware that Mother received bonuses by pointing out the numerous references in the prior orders of the court and the submissions by the County, including two orders that reflected that Father previously litigated the issue of whether Mother's bonuses should be included in her income. (App. A-14, para. 52; App. A-12, para. 28 - A-14, para. 47; Resp. A-14, para. 30.)

The references in the court proceedings to Mother's bonuses date back to a November 29, 2000 Order, from which Father sought review, arguing that Mother's bonuses be included in her income (App. A-12 - 13, paras. 31, 32). Bonuses received by Mother in 2003 and 2004 were addressed in Orders dated May 13, 2004, August 31, 2004, and January 4, 2005. (App. A-13, paras. 40, 41, 43, 44). Indeed, in the May, 2005 order which was used as the basis for Mother's income at the time of the parties' stipulation, the court rejected a claim by Father to have bonuses included in Mother's income. (App. A-14, para. 46-47; Resp. A-14, para. 30, 32).

In addition to this evidence that the district court found showed that Father was aware of the bonuses, the court found that, at the time

the agreement was read into the record, Mother's counsel noted for the record that Mother "receives periodic bonuses, which are not guaranteed based upon company and individual performance." (App. A-12, para. 20; App. A-14, para. 51; Resp. A-4, lines 13-15).

The court found that Father's argument that Mother's bonus income should be included in the calculation of her monthly income was not made when child support was set, even though Father knew that Mother received bonuses. (App. A-14, paras. 52-54; App. A-12, para. 27, 28; App. A-16, para. 73).

The court found that the reason father had agreed to the child support was that he did not wish to go to trial, to avoid the costs of litigation and the possibility that he would not prevail. (App. A-12, para. 21, 25; App. A-16, para. 74; Tr. p. 66, line 18-20; p. 53, lines 1-21). The reason Father brought the present motion was because he felt he made a bad deal. (App. A-16, para. 71). Finally, Father's arguments that he was not aware of Mother's bonuses given that he has always known Mother's compensation structure and the approximate amount of her income showed a lack of candor and was disingenuous. (App. A-16, para. 73).

The court also identified other reasons Father failed to meet his burden. The court rejected father's claims of increased expenses since they were all expenses that he should have been aware of when he agreed to accept less than guideline child support in 2005 since the child had resided with him for five months. (App. A-16, para. 69; Tr. p. 62, line 12-p. 63, line 11). Although Mother had had a nominal increase in her base income, Father admitted that his income had increased since the prior order when it was zero, but provided no verification of the amount of the increase in his income (Tr. p. 49, lines 4-6; A-16, para. 70, 78).

Father sought review of the Magistrate's order from the District Court, and the Order was affirmed. (App. A- 4-8). The District Court found that the downward deviation in child support agreed upon by the parties six months prior represented a compromise to avoid going to trial on the custody issue. (App. A-4, para. 8, 9). It reiterated that Mother's receipt of periodic bonuses was read into the record. (Id., para. 10). Finally, it affirmed the Magistrate's determination that Father failed to meet his burden to show a substantial change in circumstances. (App. A-5, 8).

SUMMARY OF ARGUMENT

While a stipulated child support order does not prevent future modification of support, where the parties have engaged in a give and take and have agreed to a deviation in child support, and the court has accepted the parties' stipulation and incorporated it into a final order, the support can be modified only upon a substantial change of circumstance that renders the child support unreasonable and unfair.

Father comes before the court six months after the parties engaged in this give and take and the court accepted their agreement, arguing changed circumstances based on facts which existed at the time of the agreement. Father's agreement to accept child support below the guidelines based on Mother's base income, with knowledge that she received periodic bonuses, prevents him from claiming that receipt of the bonus constitutes a changed circumstance. The court properly found that Respondent failed to meet his burden that receipt of the bonuses or the claimed increases in his expenses constituted a substantial change of circumstance.

Father's argument that Mother misrepresented her income was properly rejected by the District Court. Mother's base income was read into the record as was the fact that she received additional periodic bonuses which were not guaranteed based on company and individual performance.

Father's challenge to the lack of findings in the underlying support order were not properly presented for review by the District Court and are not properly before this Court. Father did not appeal the final Order and did not seek to vacate it under Rule 60. Even if Father had brought such a motion, it would fail based on the District Court's findings, amply supported in the record, that Father knew of Mother's compensation structure, and her receipt of bonuses was disclosed on the record at the time the parties' child support agreement was read into the record.

Mother asks that the District Court's finding that Father failed to satisfy his burden to show a substantial change in circumstances be affirmed.

ARGUMENT

I. THE DISTRICT COURT PROPERLY DETERMINED THAT FATHER FAILED TO MEET HIS BURDEN OF SHOWING A SUBSTANTIAL CHANGE OF CIRCUMSTANCES OCCURRED SINCE THE PARTIES STIPULATED TO CHILD SUPPORT.

An existing order for child support may be modified by the court upon a showing of a substantial change in circumstances that renders the current support order unreasonable and unfair. Bormann v. Bormann, 644 N.W.2d 478, 480-81 (Minn. App. 2002)(citing Minn. Stat. § 518.64, subd. 2; Richards v. Richards, 472 N.W.2d 162, 164 (Minn. App. 1991)). The moving party has the burden of proof. Id. at 164 (citing Johnson v. Johnson, 304 Minn. 583, 584, 232 N.W.2d 204, 205 (1975)). “In deciding whether to modify support, the district court enjoys broad discretion and will be reversed only if it abuses that discretion by resolving the question in a manner that is against logic and the facts in the record.” Id. at 164 (citing Moylan v. Moylan, 384 N.W.2d 859, 864 (Minn. 1986)).

The court’s determination that there was insufficient evidence to

find that a substantial change of circumstances had occurred was based on:

1) the fact that Mother's receipt of bonuses was known to Father at the time Father agreed to the child support order entered six months prior to Father's motion (App. A-5; A- 12-14, paras 27-53; App. A-16, para. 67);

2) that Father's claim that Mother had misrepresented her bonus income failed since Mother's receipt of additional periodic bonuses was read into the record at the time of the hearing (App. A-12, para. 20; App. A-14, para. 51);

3) that Father failed to show that his expenses had increased since the parties' stipulation (App. A-15, paras. 56-58, App. A-16, para. 69); and

4) that Father's unknown increase in income militated against a determination that a substantial change in circumstances rendered the child support unreasonable and unfair (App. A-16, para. 70).

The court's determination that Father had failed to meet his burden of proof was well supported by evidence, properly documented in the findings, and within the court's discretion.

A. Father's Agreement to a Downward Departure in Child Support based on Mother's Base Income with the Knowledge that Mother Received Periodic Bonuses Precludes Father from Claiming Mother's Receipt of a Bonus Constitutes Changed Circumstances.

Father failed to satisfy his burden that a substantial change in circumstances had occurred since the parties stipulated to child support six months earlier. "[A] stipulation fixing the respective rights and obligations of the parties represents their voluntary acquiescence in an equitable settlement, and the district court should "carefully and only reluctantly" alter its terms. O'Donnell v. O'Donnell, 678 N.W.2d 471,475 (Minn. App. 2004)(quoting Claybaugh v. Claybaugh, 312 N.W.2d 447, 449 (Minn. 1971) (spousal maintenance stipulation)). The existence of a stipulation does not, however, "bar later consideration of whether a change in circumstances warrants a modification." Id. (quoting Hecker v. Hecker, 568 N.W.2d 705, 709 (Minn. 1997). "Although a stipulation is one factor to be considered in modification motions, child support 'relates to nonbargainable interests of children and is less subject to restraint by stipulation than are other dissolution matters.'" Id. (quoting Martin v. Martin, 401 N.W.2d 107, 110 (Minn. App. 1987)[additional

citation omitted]).

A court acts within its discretion in denying a child support modification when insufficient time has elapsed between a stipulation reserving child support and a subsequent motion for child support. McNattin v. McNattin, 450 N.W.2d 169, 171 (Minn. App. 1990). As indicated above, although a previous child support stipulation does not prevent modification based on changed circumstances, “a stipulation is an important consideration in determining child support because it often results from a barter...” See Id. In McNattin, as here, that barter was an agreement on child custody in exchange for reduced (in that case reserved) child support. See McNattin, 450 N.W.2d at 171.

The Court’s decision in McNattin makes it clear that such compromises do not bargain away a child’s right to support because the child’s right to support has not been lost. The obligee is entitled to modify support by demonstrating a change in circumstances. See McNattin, 450 N.W.2d at 171-72. Although the result of McNattin is to provide an elevated standard for child support reservations by requiring a substantial change in circumstances, this result addresses both the child’s welfare and the circumstances giving rise to the

stipulation. Id. at 172. The court also has discretion to consider the fairness of the underlying order in determining whether a substantial change in circumstances has occurred. See Murray v. Murray, 425 N.W.2d 315, 317 (Minn. App. 1988)(affirming trial court's determination of substantial change in circumstances three years after stipulation for less than guideline support).

Father's arguments fail to acknowledge the give and take that resulted in the agreement to establish child support below the guidelines six months prior to his motion. The parties' agreement avoided the necessity of incurring the costs of the evidentiary hearing, both emotional and financial, satisfied Father's desire to have full physical custody of the minor child, and allayed Father's fear that he may not prevail. (App. A-12, para. 21, 22, 25; App. A-16, para. 74; Tr. p. 66, line 18-20). Father's current concern about the court having approved his agreement to establish child support below the guidelines, raised six months after his agreement, is even less compelling than mother's claim in McNattin, where no child support was established and nine months had elapsed before mother sought modification.

Father agreed to accept \$350 per month in child support in return for receiving custody without having to meet a burden he may have been unable to meet, and Mother agreed to compromise by transferring physical custody which she may well have retained after trial. Father's argument is no different from the Mother's argument in McNattin, and compels the same result—his agreement is binding until such time as he can show not only that a substantial change in circumstances has occurred, but that the change renders the child support unreasonable and unfair. See McNattin, 450 N.W.2d at 171-72.

The District Court did not refuse to consider Father's motion for modification—it determined, on the basis of the evidence in the record, including Father's testimony, that no substantial change had occurred. The district court is not, as Father argues, required to simply look at the parties' current circumstances and apply the guidelines. The guidelines are not applied until Father carries his burden to show that a substantial change of circumstances had occurred since the prior order. The District Court made detailed findings of fact and applied the proper legal standard in denying Father's motion. (App. A- 6-8; App. A - 15-16, para. 62-75).

The District Court properly found that Father did not meet his burden to show a substantial change of circumstances because he knew about Mother's salary structure and bonuses at the time he agreed to the child support amount, and it properly rejected Father's argument that Mother failed to disclose her bonus based on the disclosure of her additional bonuses on the record. The court also properly rejected Father's claimed increase in expenses for the minor child because they were being incurred at the time of the parties' agreement and, like the bonus, could therefore not constitute a change in circumstance.

i. **Father's Argument that he was not Aware Mother Received Bonuses Lacked Merit and was Properly Rejected by the Trial Court.**

Father failed to meet his burden because Mother's receipt of bonus income was not a change in circumstances at all. Father knew full well that Mother had received bonuses in the past, and Mother's attorney clearly disclosed that fact on the record at the time the agreement was presented to the court.

The District Court's findings detail all of the times that Father was informed by the County of Mother's income, the number of Orders that

included findings about her bonuses, and the Orders that reflected that Father actually litigated how the bonuses should be treated in the past. (App. A-12-14, paras. 26-52; Resp. A-14, para. 30). In November of 2000 and May 2005, Father argued that Mother's bonuses should be included in her income. (App. A-13, para. 32; A-14, para. 46). In fact, the May 26, 2005 order which the parties used as the basis for their stipulation, determined that Mother's base income was \$4,386 and that bonuses were not included in that amount for child support purposes. (App. A-14, para. 47; Resp. A-14, para. 30).

Father's arguments which assume that the bonuses are properly includable in Mother's income, despite the fact that Mother's receipt of bonuses was not a change of circumstance at all, were properly rejected by the District Court.

- ii. **Father's Argument that Mother Misrepresented her Income by Not Disclosing that She received Bonuses when her Receipt of Bonuses were Expressly Disclosed on the Record at the time of the Stipulation Lacked Merit and was Properly Rejected by the Trial Court.**

Father's brief continues to tell only half of the story and ignores the significant fact that Mother's receipt of additional bonuses was

specifically addressed at the time they agreed to the current child support order. Mother's base income figure as found by the Magistrate three months earlier was read into the record, and Mother's counsel also noted that Mother received additional, periodic bonuses. The disclosure could not have been more clear:

"The child support amount will be \$350.00 per month which is a downward departure. Ms. Frank-Bretwisch's net monthly income is \$4,396 per month. That is set forth in the Findings of Fact, Conclusions of Law and Order covered by Magistrate Pasteur [phonetic] on May 26, 2005. She, also, receives periodic bonuses which are not guaranteed based upon company and individual performance."

(Resp. A- 4, lines 8-15).

Father's claim that Mother "misrepresented" her income does not become true by reason of Father's repetition. Father's continuing arguments, in the face of the transcript that proves otherwise, casts serious doubt on his candor and his good faith in this proceeding.

By characterizing this as a case involving misrepresentation, despite the repeated times the court has addressed Mother's bonuses and the express disclosure on the record at the time he agreed to deviate from guideline child support, Father seeks to detract the court from the real issue, which is Father's attempt to argue that Mother's receipt of

bonuses he was well aware of and which were disclosed on the record somehow constitute changed circumstances. The District Court properly rejected Father's charade and found that Father had failed to show a substantial change in circumstances.

B. Father's Agreement to a Downward Deviation in Child Support with Knowledge of Expenses he was Incurring as a Custodial Parent Preclude Father from Claiming those Same Expenses as Changed Circumstances.

The court also properly considered, and rejected, Father's argument that his expenses had substantially increased since the time of the parties' agreement. The court found that the expenses Father was claiming were not new or unanticipated expenses, since Father had already had the minor child in his care. (App. A-15, para. 57, 58).

The court's rejection of Father's argument was within its discretion and supported by the case law. Generally, in the absence of dramatic or unanticipated changes, ordinary expenses faced within months of a stipulated child support order are insufficient to support its modification. See O'Donnell, 678 N.W.2d at 476. This is particularly true when the party claiming the increased expenses of having the

children in his care “had been actively involved in caring for the children prior to the [order] and had sufficient opportunity to assess their needs.” Id. Here, the Father’s claim of increased expenses, occurring six months after the agreement, when the minor child had resided with him for five months at the time of the agreement, two of which were months that the child was in school, were insufficient to show a substantial change in circumstances.

Father’s failure to show a substantial increase in Mother’s income or a substantial increase in his expenses had occurred since the prior child support order supported the court’s determination that Father failed to meet his burden. Even if the court had determined one of these constituted a substantial change, Father’s failure to provide the court with information about his income also militated against any determination that a substantial change in circumstances occurred that rendered the support unreasonable and unfair. At the time of the September 2005 Order, Father’s income was zero. (App. A-23, para. 6). Father acknowledged at the time of the hearing on his motion to modify support that he was now earning some income, but it was not provided to the court. (Tr. p. 48, lines 21-25; p. 49, lines 4-6; App. A-16, para. 70).

The court's finding that Father had failed to meet his burden of proving a substantial change is based on the testimony and other evidence in the record. No substantial change in circumstances could exist based on Mother's receipt of bonuses Father was aware of and had litigated in prior proceedings and acknowledged on the record at the time of the child support stipulation or expenses he was already incurring at that time.¹ The District Court acted well within its discretion when it determined that Father failed to meet his burden of showing a substantial change in circumstances.

¹ Had Mother's receipt of bonuses not been the subject of previous litigation and had Mother's bonuses not been disclosed at the time of the agreement, the court still would have been well within its discretion in denying modification. Even substantial income increases do not, as a matter of law, compel a modification in the absence of a determination that such an increase renders child support unreasonable and unfair. See Thielbar v. Defeil, 378 N.W.2d 643, 645 (Minn. App. 1985)(71% increase in obligor's income insufficient in the absence of increased needs which make support unreasonable and unfair).

C. **Father's Failure to Show a Substantial Change in Circumstances Compelled Denial of his Motion and Preclude Further Findings on the Statutory Grounds for Modification.**

Father argues that the district court was required to make findings identifying whether the substantial change in circumstances rendered the decree unreasonable and unfair, citing Martin, 401 N.W.2d 107. Father confuses the need for the court to make findings on both requirements of Minn. Stat. § 518.64, subd. 2(a) *when it modifies support*, which the Martin case addresses, with the findings necessary *when it denies modification* because a party has failed to satisfy one of the prongs. In order to modify child support, the court must find that a substantial change in circumstances occurred, and that the substantial change rendered the child support unreasonable and unfair. Martin, 401 N.W.2d at 109.

In contrast, the court's determination that a party has failed to meet the threshold burden of establishing a substantial change in circumstances ends the inquiry:

Minn. Stat. § 518.64, subd. 2(a) presents a two-pronged threshold for modification: support cannot be modified absent findings of *both* substantially changed circumstances *and* that the substantially

changed circumstances render the existing support award unreasonable and unfair. Minn. Stat. § 518.64, subd. 2(a). To fully address the modification motion, a district court that finds that circumstances have substantially changed *must* then address whether those changed circumstances render the existing award unreasonable and unfair, but a finding of the lack of either threshold condition for modification renders a finding on the other threshold condition unnecessary.

Bormann, 644 N.W.2d at 481.

Here, the court explicitly determined that Father had not met his burden to show a substantial change of circumstances. Since Father failed to meet his threshold burden, no additional findings were necessary or appropriate.

The District Court's findings detailing its determination that Father failed to show a substantial change in circumstances were grounded in the evidence in the record, and its denial of Father's motion for a modification should be affirmed.

II. THE DISTRICT COURT PROPERLY REJECTED FATHER'S ATTEMPT TO USE MINN. STAT. § 518.64 AS A VEHICLE TO REVIEW THE PROPRIETY OF THE COURT'S SEPTEMBER 2005 ORDER.

A. Father's Claims that the September 2005 Order Lacked Findings to Support the Deviation and Findings on the Child's Best Interests Were Waived by his Failure to Seek Proper Review of the Order.

Father's argument in section II of his Brief should be rejected in its entirety because the propriety of the August 2005 Order was not properly before the District Court and is not properly before this Court. This final order was not appealed within the time permitted for appeal by Minn. R. Civ. App. P. 104.01, nor has Father brought a motion to vacate the September 27, 2005 Order. The propriety of the findings set forth in this stipulated order is therefore not subject to review.

Father's suggestion that the District Court was required to make findings in its September 27, 2005 Order to support its deviation is nonsensical. The District Court did not deviate from the guidelines; it denied Father's motion to modify because he failed to meet his burden for modification. As set forth above, once the court found that Father had failed to show a substantial change in circumstances, his motion

was properly denied without further findings. Father seems to concede this argument in another section of his brief, where he acknowledges that the propriety of the downward deviation is not a subject for the trial court's review. (App. B. p. 24).

Father's argument that the court erred by referring to Father's failure to bring a Rule 60 motion is not supported by the law. The cases relied on by Father support only the proposition that Rule 60 cannot be used to challenge divorce decrees. See Maranda v. Maranda, 449 N.W.2d 158, 164 (Minn. 1989) (noting that the legislature's amendment of Minn. Stat. § 518.145, subd. 2, which is virtually identical to Rule 60.02, provides the mechanism for reopening dissolution decrees. Id. at 164, footnote 1.) However, because this is a support order in a paternity proceeding, a timely Rule 60 motion is a proper avenue for relief. Reid v. Strodtman, 631 N.W.2d 414, 418 (Minn. App. 2001)(citing Hennepin Cty. Welfare Bd. v. Kolkind, 391 N.W.2d 539, 540-41 & n. 1 (Minn. App. 1986)).

Father has not brought a motion under either Rule 60 or Minn. Stat. § 518.145. Father's argument that Minn. Stat. § 518.64, subd. 2(d)(1) creates "an alternative statutory remedy", while certainly

creative, is contrary to the express language of the statute. Subdivision 2(d) of Minn. Stat. § 518.64 merely addresses the effective date of a modification when a party is “precluded from serving a motion” for various reasons, including a material misrepresentation or fraud upon the court. Subd. 2(d) has no applicability when the moving party cannot meet his or her threshold burden, which is set forth in subd. 2(a). See Minn. Stat. § 518.64, subd. 2(a).

B. Even if Father Could Use Minn. Stat. §518.64 as a Substitute for Rule 60, the Court Property Rejected his Claim of Misrepresentation since it Had no Basis in Fact.

Had Father brought a Rule 60 motion instead of a motion to modify under Minn. Stat. § 518.64, it would necessarily fail based on the findings made by the District Court. As set forth above, Father’s claim that Mother failed to disclose her bonuses is baseless.

Father’s fraud argument also fails because it relies on inapposite cases. Father cites cases allowing dissolution property settlements to be vacated because a husband or wife breached his or her duty of disclosure of assets and liabilities; these cases are simply not applicable

in this paternity/child support proceeding. Were this a dissolution proceeding, Father's claim would still fail since, nondisclosure by one party breaches a duty to disclose only assets whose existence or size is unknown. See Doering v. Doering, 629 N.W.2d 124, 130 (Minn. App. 2001); Bollenbach v. Bollenbach, 285 Minn. 418, 428, 175 N.W.2d 148, 155 (1970)(failure to disclose assets justifies adverse inferences to party "who conceals or evades."). As detailed above, the district court identified 18 different instances where Mother's income and bonuses were addressed in prior litigation in addition to Mother's express disclosure on the record at the time of the parties' stipulation.

This was a voluntary stipulation, which followed years of litigation where mother's income and receipt of bonuses was well established and not subject to doubt. As the District Court noted, Father's claims that he lacked knowledge of Mother's compensation structure and income cast serious doubt on Father's candor with the court.² (App. A-16, para. 73).

² The district court had an opportunity to weigh Father's testimony, and its determinations of credibility are within its province and are not reassessed on appeal. See Sefkow v. Sefkow, 427 N.W.2d 203, 210 (Minn. 1988) ("Deference must be given to the opportunity of the trial court to assess the credibility of the witnesses.")

This is not a case where bonus income was hidden by one party from the other party to induce a settlement. The fact that the receipt of bonuses was put onto the record as part of the basis for the stipulation demonstrates otherwise. If Father had any concern about the bonuses or deviating from the guidelines, he had an opportunity and an obligation to inquire before he voluntarily entered into the agreement. Father's choice to hide in the weeds for six months then jump out claiming he had no knowledge about Mother's bonuses, when he knew from the history of the case and the information disclosed on the very day he entered into the agreement, justify the court's determination that Father lacked candor and his arguments were disingenuous.

Father's challenge to the September 2005 order is not properly before this Court. Even if it were, the District Court has already rejected the basis for his attack on the order when it found that no misrepresentation occurred.

Because the District Court's decision was unaffected by any error of law, it should be affirmed.

CONCLUSION

Father failed to meet his burden of proving a substantial change in circumstances had occurred since the stipulated Order establishing child support was entered. Mother's receipt of bonuses was known to Father, detailed in the court file, and expressly disclosed at the time the parties agreed to child support. Father's claimed increased expenses were properly rejected by the court. Father's challenge to the findings made in the stipulated child support order were not properly before the court.

Mother respectfully requests that the Orders of the District Court denying Father's motion for modification of child support be affirmed.

Dated: January 5, 2007.

RESPECTFULLY SUBMITTED

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CERTIFICATE AS TO BRIEF LENGTH

The undersigned hereby certifies that the foregoing Brief complies with the limitations as set forth in Rule 132.01, subd. 3(a)(1) in that it complies with the typeface requirements, was prepared in Word, and contains 5,203 words.

Dated: January 5, 2007.

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