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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-2166**

In re the Matter of: C. O., petitioner,
Appellant,

vs.

John and Jackie Doe,
Respondents.

**Filed July 2, 2012
Reversed and remanded
Stauber, Judge**

Washington County District Court
File No. 82F606007919

Mark A. Olson, Burnsville, Minnesota (for appellant)

Mark D. Fiddler, Minneapolis, Minnesota (for respondent)

Considered and decided by Cleary, Presiding Judge; Stauber, Judge; and Collins, Judge.*

UNPUBLISHED OPINION

STAUBER, Judge

On appeal after remand, appellant argues that the district court abused its discretion by awarding appellant only \$20,000 in attorney fees and holding that appellant was not entitled to attorney fees for the prior appeal. Because the district court did not

* Retired judge of the district court, serving by appointment pursuant to Minn. Const. art. VI, § 10.

fully comply with our remand instructions, we reverse the district court's attorney-fee award and remand for further proceedings. And because the district court failed to follow our remand instructions with regard to the appellate-attorney-fee award, we reverse the district court and award appellant \$15,500 in attorney fees for the prior appeal.

FACTS

Appellant C.O. is the biological father of A.D. (the child). Respondents John and Jackie Doe are the child's adoptive parents. The underlying dispute in this matter involves the existence and extent of appellant's right to have continuing contact with the child under a contact agreement that the parties entered into pursuant to Minn. Stat. § 259.58 (2010), before appellant voluntarily terminated his parental rights.

Appellant moved to enforce his rights under the contact agreement, and respondents moved to dismiss the motion. Respondents also asked the district court to apply a provision in the agreement that allowed the court to terminate appellant's contact with the child. After hearing argument on the motions—but without holding an evidentiary hearing—the district court concluded that appellant's conduct amounted to “exceptional circumstances” under section 259.58 warranting termination of the contact agreement, and it granted respondents' motion. This court affirmed in an unpublished opinion. *C.O. v. Doe*, No. A07-826, 2007 WL 4111206 (Minn. App. Nov. 20, 2007) (*C.O. I.*), *rev'd*, 757 N.W.2d 343 (Minn. 2008) (*C.O. II.*).

The supreme court granted review and held that the lack of an evidentiary hearing denied appellant due process. *C.O. II*, 757 N.W.2d at 348 n.8, 349-52. Remanding the case to the district court, the supreme court noted that Minn. Stat. § 259.58 does not identify

which party bears the burden of proof regarding motions to enforce or modify contact agreements but that generally the party seeking to benefit from a statutory provision bears such a burden. *Id.* at 352. The supreme court also held that respondents bore the burden of showing exceptional circumstances justifying modification of the contact agreement. *Id.* at 353.

Following release of the supreme court opinion in *C.O. II*, appellant moved the supreme court for attorney fees on grounds including, but not limited to, Minn. Stat. § 549.211 (2010). The supreme court remanded the motion to the district court. *C.O. v. Doe*, No. A07-826 (Minn. Nov. 26, 2008) (order).

On remand, the district court held the required evidentiary hearing and issued a series of orders. These orders, among other things; (1) denied respondents' motion to modify or terminate the contact agreement; (2) awarded appellant \$16,350 in attorney fees from respondents' former counsel for fees that appellant incurred in responding to a constitutional argument that was made for the first time on appeal to the supreme court; and (3) awarded appellant \$95,942.65 in attorney fees from respondents for other aspects of the proceeding.

After the district court entered judgment on the fee awards, respondents' former counsel appealed the judgment against her, and respondents' current counsel—who had been retained as co-counsel on remand from the supreme court—separately appealed on respondents' behalf. This court consolidated the appeals and released an unpublished opinion that, in relevant part, reversed the \$16,350 attorney-fee award against respondents' former counsel based on noncompliance with Minn. Stat. § 549.211; concluded that the district court's findings supporting the \$95,942.65 attorney-fee award did not address the

factors set out in *State v. Paulson*, 290 Minn. 371, 373, 188 N.W.2d 424, 426 (1971), and remanded the award “for findings on the *Paulson* factors” with instructions to “make adequate findings of fact to support whatever amount of fees [the district court] concludes is reasonable to award.” *C.O. v. Doe*, No. A10-404, 2010 WL 4721531, at *4, 11 (Minn. App. Nov. 23, 2010) (*C.O. III*), *review denied* (Minn. Feb. 15, 2011).

Following the release of this court’s opinion, appellant moved for attorney fees incurred on appeal, relying on Minn. Stat. § 259.58(c). This court granted the motion. *C.O. v. Doe*, No. A10-404 (Minn. App. Feb. 22, 2011) (order). While noting that it was usually “the better practice for appellate courts to determine the reasonableness of attorney fees claimed for appellate proceedings,” we nonetheless held that “[t]he amount of attorney fees incurred in [appellant’s] successful defense before this court of district court rulings favorable to [appellant] is remanded to the district court, for further findings and proceedings.” *Id.*

By the time that the case was remanded for the second time, the district court judges who had issued the previous orders had retired, and the matter was reassigned to a third district court judge. The district court, after analyzing the *Paulson* factors, found that “it is reasonable to award [appellant’s] attorney fees for his legal representation, but not for the 350 plus hours that have been requested by [appellant’s] attorney.” The district court also found that the \$16,350 award assessed against respondents’ former counsel was “specifically designated sanction-based fees” and declined to assess the award to respondents. Finally, the district court found that “an award of attorney fees for [appellant’s] appeals is not warranted.”

Based on these findings, the district court ordered respondents to pay \$20,000 in attorney fees to appellant's counsel, instead of the earlier award of \$95,942.65. The order directed respondents to pay the award within 120 days and stated that judgment would be entered if the payment was not made within that time. It appears from the record that respondents tendered payment of \$20,000, but appellant's counsel did not accept the payment. This appeal follows.

D E C I S I O N

We note at the outset that a sizeable portion of appellant's brief is dedicated to challenging this court's remand of the attorney fees in the prior appeal (*C.O. III*), arguing that (1) respondents did not challenge the reasonableness of the fees and therefore we should not have addressed the issue; (2) *Paulson* findings are not necessary for an attorney-fee award under Minn. Stat. § 259.58(c); and (3) the \$16,350 attorney-fee award assessed against respondents' former counsel should be reinstated. But "when an appellate court has ruled on an issue, the issue decided becomes the law of the case and may not be relitigated . . . or re-examined." *Kissoondath v. U.S. Fire Ins. Co.*, 620 N.W.2d 909, 917 (Minn. App. 2001) (quotation omitted), *review denied* (Minn. April 17, 2001); *see also* Minn. R. Civ. App. P. 140.01 ("No petition for rehearing shall be allowed in the Court of Appeals."). We therefore do not address appellant's challenges to our opinion in *C.O. III*, including applicability of the *Paulson* factors to an attorney-fee award under section 259.58.

I.

A. Reopening of the record

Appellant argues that the district court on remand considered “matters that occurred after [the previous district court judge’s] decisions were finally concluded.” We read this argument as asserting that the district court abused its discretion by reopening the record, and the district court should have based its findings on the record as it existed at the time of the prior order. On remand, a district court must strictly execute the remanding court’s instructions without altering, amending, or modifying the mandate. *Halverson v. Vill. Of Deerwood*, 322 N.W.2d 761, 766 (Minn. 1982). If, however, a district court does not have “specific directions as to how it should proceed” on remand, it has discretion to “proceed in any manner not inconsistent with the remand order.” *Duffey v. Duffey*, 432 N.W.2d 473, 476 (Minn. App. 1988). “Appellate courts review a district court’s compliance with remand instructions under the deferential abuse of discretion standard.” *Janssen v. Best & Flanagan, LLP*, 704 N.W.2d 759, 763 (Minn. 2005).

Our opinion in *C.O. III* held, in relevant part, that while the former district court judge had made findings regarding its fee award, the findings did not address most of the factors set out in *Paulson*. 2010 WL 4721531, at *11. Accordingly, we remanded the matter to the district court for fee-award findings on the *Paulson* factors and instructed the district court to “make adequate findings of fact to support whatever amount of fees it concludes is reasonable to award.” *Id.* The remand instructions did not indicate that the district court was to base its findings on the then-existing record and did not restrict the

district court's discretion to consider additional evidence. Indeed, to the extent that the then-existing record was inadequate to allow findings on the *Paulson* factors, the district court may have abused its discretion had it *not* reopened the record. We therefore see no error in the district court's consideration of matters not in the record at the time the prior order was entered.

B. District court's \$20,000 attorney-fee award

In *C.O. III*, we instructed the district court to make findings on the *Paulson* factors regarding the attorney-fee award, which was originally set at \$95,942.65. 2010 WL 4721531, at *11. The district court's order on remand arguably complies with the instructions by addressing the six factors that the supreme court articulated in *Paulson*. In conducting its analysis of the *Paulson* factors, the district court found, among other things, that (1) it is "unreasonable that [appellant] was billed at a rate of \$300 for every hour of legal work performed by [his counsel]"; (2) that, in the district court's experience, family-law attorney-fee awards are generally requested "at the rate of \$200 to \$250 per hour"; and (3) appellant's counsel "incurring over 350 hours of billable work is questionable." Based on these findings, the district court awarded \$20,000 in attorney fees.

But these findings do not satisfy the second portion of our remand instructions, which required the district court to make "adequate findings of fact to support whatever amount of fees it concludes is reasonable to award." *Id.* Noticeably absent from the district court's findings on remand is a finding of what constitutes a reasonable hourly rate (other than a range of \$200 to \$250), or how many hours were reasonably incurred

(beyond the finding that 350 hours was “questionable”). The findings on remand do not support the \$20,000 award and are therefore inconsistent with our remand instructions.

We therefore reverse the district court’s \$20,000 attorney-fee award and remand the matter to the district court for further proceedings consistent with this opinion. On remand, the district court shall (1) conduct a thorough and complete review of the documentation submitted in support of appellant’s attorney-fee motion; (2) specifically identify a reasonable hourly rate in the \$200-250 range; (3) specifically identify the number of hours appellant’s attorney reasonably incurred in this matter; and (4) award appellant attorney fees accordingly.

II.

Appellant moved for attorney fees incurred in the prior appeal in the amount of \$64,436.10. When a statute provides for an award of attorney fees in the district court, additional fees spent in defending an attorney-fee award on appeal are recoverable, so as to avoid dilution of the district court’s award. *Hughes v. Sinclair Mktg.*, 375 N.W.2d 875, 879 (Minn. App. 1985), *aff’d in part, rev’d in part on other grounds*, 389 N.W.2d 194, 200 (Minn. 1986). We previously granted appellant’s motion for appellate attorney fees to be paid by respondents. *C.O. v. Doe*, No. A10-404 (Minn. App. Feb. 22, 2011) (order). This court then remanded “[t]he amount of attorney fees incurred in [appellant’s] successful defense before this court of district court rulings favorable to [appellant] . . . for findings and further proceedings.” *Id.*

On remand, the district court determined that an award of attorney fees for the appeals was “not warranted.” But that issue was not before the district court. We granted

attorney fees incurred on appeal and the remand was limited to determining the amount of those fees. By denying appellate fees, the district court exceeded the scope of the remand instructions and abused its discretion. *See Halverson*, 322 N.W.2d at 766 (stating that district court must strictly execute the remanding court’s instructions without altering, amending, or modifying the mandate).¹

The “better practice” is for appellate courts to determine the reasonableness of attorney fees claimed for appellate proceedings. *Hughes*, 389 N.W.2d at 200. We have therefore carefully evaluated appellant’s attorney-fee request submitted in the prior appeal, tabulating the number of hours appellant’s counsel spent on legal research, court appearances, drafting, meeting with the client, and miscellaneous administrative work. Based on our extensive review, we award appellant \$15,500 in attorney fees incurred in *C.O. III*.²

Reversed and remanded.

¹ At oral argument, respondents asserted that the \$20,000 district court award represented an aggregate total of the attorney fees that the district court concluded were reasonable for both the district court proceedings and appellant’s successful defense of the attorney-fee award in *C.O. III*. But this assertion is directly contradicted by the district court’s order, which found that appellate fees were “not warranted.”

² We base this award on what we conclude was a reasonable number of hours and hourly rate for the appeal; to wit, 53 hours spent doing research, drafting, court appearances, and preparation at \$250 per hour and 15 hours of administrative work at \$150 per hour.