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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0381**

In re the Matter of:
Jeffrey James Chomiuk, petitioner,
Appellant,

vs.
Elizabeth Chomiuk,
Respondent.

**Filed February 11, 2013
Affirmed
Hooten, Judge**

Hennepin County District Court
File No. 27-FA-06-3314

John P. Guzik, Guzik Law Office, P.A., Roseville, Minnesota (for appellant)

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Considered and decided by Connolly, Presiding Judge; Hooten, Judge; and Kirk,
Judge.

UNPUBLISHED OPINION

HOOTEN, Judge

Appellant-obligor challenges the district court's order: (1) denying his motion to vacate a prior order reinstating his support and maintenance obligations and modify his ongoing spousal maintenance obligation; (2) vacating a separate prior order suspending his spousal maintenance obligation and modifying his child support obligation; and (3)

awarding need-based and conduct-based attorney fees. Because the district court did not abuse its discretion by vacating its prior order suspending maintenance and modifying support, denying the motion to modify ongoing maintenance, and awarding conduct-based attorney fees, we affirm.

FACTS

Appellant Jeffrey Chomiuk and respondent Elizabeth Chomiuk were divorced on May 30, 2008, upon the filing of a stipulated judgment and decree. The parties agreed to joint legal and physical custody of their minor daughter (their two older children having already turned 18 years of age), subject to an equally shared parenting-time schedule. The parties stipulated that appellant received an offer for employment as a pharmacy manager earning gross annual income of \$123,491, and that respondent earned average gross monthly income of \$616. The parties also stipulated that respondent had monthly expenses of \$4,762, and that appellant had monthly expenses of \$4,885. Appellant's basic monthly support obligation was \$763, and he was also required to pay respondent \$1,855 in monthly maintenance through April 30, 2008. Beginning May 1, 2008, appellant was required to pay \$2,500 in monthly maintenance until respondent's remarriage or the death of either party.

On March 24, 2010, appellant, proceeding pro se, moved to modify his support and maintenance obligations, citing substantially decreased gross income. He explained that he had limited on-call employment since September 2009 and was earning \$3,186 per month, with monthly expenses of \$4,466. On April 12, 2010, respondent was served with the motion and notice of the hearing date by mail at the residence listed in the

stipulation. After respondent failed to appear at the hearing, the district court issued an order that same day finding that appellant was earning \$1,473 per month, reducing appellant's child support obligation to \$251 per month, temporarily suspending his maintenance obligation, and ordering appellant to provide notification in the event he obtained additional gainful employment. The district court's order was returned from respondent's address as unclaimed.

One year later, on April 29, 2011, respondent moved to vacate the district court's order of April 29, 2010 pursuant to Minn. Stat. § 518.145, subd. 2(1), (4) (2012), and reinstate the maintenance obligation established in the stipulation. Respondent also requested a support obligation "to reflect the fact that the minor child resides solely with Respondent and that [appellant] exercises no parenting time with the minor child." According to her affidavit, respondent asserted that she was earning gross monthly income of \$500, had current monthly expenses of \$2,733, and never received notice of appellant's motion because she moved from her prior address to a new residence on March 27, 2010. She explained that her support payments were collected by Hennepin County and that, even though she was receiving reduced monthly payments prior to the filing of appellant's motion and had not received maintenance for months, she assumed that "he had just decided he didn't want to pay me." Respondent was unaware of the reduction ordered by the district court and only became aware of the order reducing child support and spousal maintenance after speaking with a support worker on February 24, 2011. On April 29, 2011, appellant was served by mail with respondent's motion and

notice of the hearing date set for May 23, 2011, at his “last known addresses,” listed as a residence in Mahtomedi, Minnesota and a P.O. Box in South St. Paul.

The district court granted respondent’s motion in an order filed May 24, 2011, after appellant failed to appear, noting that the service mailed to appellant’s Mahtomedi address was returned with a forwarding address to the South St. Paul post office box, and that service was also mailed to his post office box. The district court reinstated appellant’s prior maintenance and support obligations and modified the parties’ parenting time. Notice of this order was mailed to appellant’s address in South St. Paul.

Thereafter, on September 6, 2011, appellant moved for reconsideration of the issues decided in the order of May 24, 2011. Appellant requested that the district court vacate the May 24, 2011 order because he was not served with respondent’s motion. Appellant requested that the maintenance obligation be terminated, reserved, suspended or reduced, and his support obligation be modified based upon a substantial change in the parties’ financial circumstances. He also requested an evidentiary hearing to resolve these issues.

Appellant’s affidavit asserted that he never received notice of respondent’s motion because he was no longer residing at the Mahtomedi address and was no longer renting the post office box. He explained that he learned of the motion and hearing after respondent’s attorney mailed the order of May 24, 2011 to the Mahtomedi address and his friend forwarded the documents to him. Appellant stated that his adjusted gross income for 2010 was \$38,770 and explained that, as of March 2011, he was employed as a pharmacist in Lihue, Hawaii earning monthly gross income of \$9,436, with a monthly

net income of approximately \$5,200, and incurring monthly expenses of \$5,175 due to the increased cost-of-living in Hawaii. Respondent filed a responsive motion seeking increased support and need-based attorney fees. An evidentiary hearing was held on November 14, 2011.

In an order filed on January 3, 2012, the district court noted that the problems arose due to the failure of both parties to provide notification of changes to his or her mailing address as required by the parties' stipulated judgment and decree. With respect to the parties' financial circumstances, the district court found that respondent earned an average gross monthly income through the first ten months of 2011 of \$968, consistent with her income and earning capacity at the time of the stipulation, and that her budget of \$4,762 was reasonable given the marital standard of living. The district court found that appellant failed to comply with the requirement in the order of April 29, 2010 that he inform the court of any gainful employment, and further found that appellant had gross monthly income of \$11,315, including overtime earnings, and that his claimed monthly expenses were excessive given the fact that he "chose to move to Hawaii." The district court concluded that \$4,000 per month would be a reasonable budget for appellant, reasoning that he had decreased expenses because he no longer exercised regular parenting time.

Further, the district court concluded that, pursuant to Minn. Stat. § 518.145, subd. 2(4), the order of April 29, 2010 is "void and unenforceable" for lack of personal jurisdiction because respondent was not properly served with notice of appellant's motion. Alternatively, the district court concluded that the order should be vacated on the

basis of surprise, mistake or excusable neglect pursuant to Minn. Stat. § 518.145, subd. 2(1), because it was undisputed that respondent did not receive a copy of the order and did not become aware of the order until February 24, 2011.

In response to appellant's attempts to modify his maintenance and support obligations, the district court found that appellant's 2010 income constituted a temporary substantial decrease in gross income justifying a temporary reduction in his maintenance obligation between May 1, 2010 and March 1, 2011. The district court calculated that appellant's average monthly gross income in 2010 represented a 54% reduction in gross income and retroactively modified his maintenance obligation by a corresponding amount. The ongoing maintenance obligation of \$2,500 per month remained in place. The district court also awarded respondent \$3,055 in both need- and conduct-based attorney fees, finding that she did not have the financial ability to pay attorney fees. In support of the award of attorney fees to respondent, the district court explained that appellant "made no support or maintenance payments . . . between July and October 15, 2011, even though he was earning an average of \$12,000 per month," causing "substantial financial hardship for [respondent] and the parties' minor child."

D E C I S I O N

1. Order of April 29, 2010

Appellant argues that the district court erroneously vacated the order of April 29, 2010 under Minn. Stat. § 518.145, subd. 2(4). This statutory provision authorizes a court to relieve a party from a judgment, decree, or order that is void. "A judgment is void if the issuing court lacked jurisdiction over the subject matter, lacked personal jurisdiction

over the parties through a failure of service that has not been waived, or acted in a manner inconsistent with due process.” *Bode v. Minn. Dept. of Natural Res.*, 594 N.W.2d 257, 261 (Minn. App. 1999), *aff’d*, 612 N.W.2d 862 (Minn. 2000). “Due process requires that a defendant receive notice of a civil action and an opportunity to be heard.” *Wick v. Wick*, 670 N.W.2d 599, 603 (Minn. App. 2003). “This requirement is satisfied if the plaintiff complies with an officially prescribed process for invoking the district court’s jurisdiction that, when followed, is reasonably likely to provide the defendant with actual notice of the action.” *Id.* The “officially prescribed processes” for service of process is set forth in the Minnesota Rules of Civil Procedure. *Id.* Service shall be made personally, by facsimile, or by mail. Minn. R. Civ. P. 5.02. “Service upon . . . a party shall be made . . . by mailing a copy to the . . . party at the . . . party’s last known address.” *Id.* “Service by mail is complete upon mailing.” *Id.*

As noted by appellant, the district court’s findings support the conclusion that appellant complied with Minn. R. Civ. P. 5.02 when serving his motion. Appellant is correct that because he complied with the service requirements under the rules of civil procedure by mailing his motion to respondent’s last known address, the district court had personal jurisdiction over respondent.

However, appellant has not shown that the district court erred in vacating the order of April 29, 2010 under Minn. Stat. § 518.145, subd. 2(1). This provision, which allows a court to vacate an order for “mistake, inadvertence, surprise, or excusable neglect,” is similar to Minn. R. Civ. P. 60.02(a). *See Peterson v. Eishen*, 512 N.W.2d 338, 341 (Minn. 1994) (applying rule 60.02 to analysis of motion to vacate orders and judgment in

a paternity matter governed by section 518.145, subdivision 2), *superseded by rule on other grounds*, Minn. R. Civ. P. 12.02, *as recognized in Federal–Hoffman, Inc. v. Fackler*, 549 N.W.2d 93, 95 (Minn. App. 1996), *review denied* (Minn. Aug. 20, 1996).

Because section 518.145, subdivision 2(1), is similar to rule 60.02, the factors for relief set forth in *Finden v. Klaas*, 268 Minn. 268, 271, 128 N.W.2d 748, 750 (1964), are applicable. “A party seeking relief under Minn. R. Civ. P. 60.02 must establish (1) a reasonable case on the merits; (2) a reasonable excuse for the failure to act; (3) action with due diligence after entry of judgment; and (4) lack of prejudice to the opposing party.” *Reid v. Strodtman*, 631 N.W.2d 414, 419 (Minn. App. 2001) (citing *Finden*, 268 Minn. at 271, 128 N.W.2d at 750). “All four elements must be proven, but a weak showing on one factor may be offset by a strong showing on the others.” *Id.* The decision to grant relief under Minn. Stat. § 518.145, subd. 2(1), is discretionary with the district court. *Clark v. Clark*, 642 N.W.2d 459, 465 (Minn. App. 2002).

In reviewing the district court’s application of the *Finden* factors to this case, we conclude that the district court did not abuse its discretion in vacating its order of April 29, 2010 pursuant to section 518.145, subdivision 2(1). The district court noted respondent’s assertions that she did not receive notice of the order and was unaware of the order until she spoke with a support worker in late February 2011. While respondent noted that appellant was failing to pay child support and spousal maintenance as required under the stipulated judgment and decree after April 29, 2010, she assumed that he was simply choosing not to pay her, which is consistent with the significant amount of arrears that had accrued within the short time that income withholding had been in effect.

Respondent brought her motion to vacate within weeks of being advised of the existence of the order of April 29, 2010. Appellant cannot show that he was prejudiced by the vacation of this order since he failed to comply with the requirement that he advise the district court of any change of address and obtained new employment in Hawaii in March 2011, earning a gross monthly income of \$11,315.

2. Adequacy of Modification Findings

Appellant next argues that the district court abused its discretion by failing to adequately address the factors set forth in Minn. Stat. § 518A.39 (2012). “The district court has broad discretion in deciding whether to modify a spousal maintenance award.” *Kielley v. Kielley*, 674 N.W.2d 770, 775 (Minn. App. 2004). “A district court abuses its discretion when its decision is against logic and the facts on record.” *Id.* (quotation omitted). The district court’s findings must be upheld unless clearly erroneous. *McCulloch v. McCulloch*, 435 N.W.2d 564, 566 (Minn. App. 1989).

“The terms of an order respecting maintenance or support may be modified upon a showing of one or more of the following, any of which makes the terms unreasonable and unfair: (1) substantially increased or decreased gross income of an obligor or obligee; (2) substantially increased or decreased need of an obligor or obligee” Minn. Stat. § 518A.39, subd. 2(a). This “dual burden” of showing that there has been a change in circumstances and that the change renders the maintenance unreasonable and unfair falls on the party seeking modification. *Hecker v. Hecker*, 568 N.W.2d 705, 709 (Minn. 1997). “On a motion for modification of maintenance, . . . the court shall apply, in addition to all other relevant factors, the factors for an award of maintenance under

section 518.552 that exist at the time of the motion.” Minn. Stat. § 518A.39, subd. 2(d). To modify maintenance obligations, a district court must make particularized findings “to show that relevant statutory factors have been considered.” *Tuthill v. Tuthill*, 399 N.W.2d 230, 232 (Minn. App. 1987). “Where the findings are insufficient to determine that the trial court addressed the factors expressly mandated by the legislature, the matter should be remanded for further findings.” *Id.* However, “the district court is not required to make specific findings on every statutory factor if the findings that were made reflect that the district court adequately considered the relevant statutory factors.” *Peterka v. Peterka*, 675 N.W.2d 353, 360 (Minn. App. 2004).

The district court properly addressed the relevant statutory factors. The order of January 3, 2012 sets forth the parties’ respective financial circumstances at the time of the stipulation and notes that respondent was not employed outside the home during most of the parties’ marriage. The district court concludes that respondent’s current budget “represents a reasonable budget considering the marital standard of living,” a reasonable conclusion given appellant’s income as a pharmacist. The district court also finds that respondent earns current gross monthly income of \$968. The district court outlined appellant’s explanation that he experienced substantially reduced income between September 2009 and March 2011 and noted his current monthly gross income of \$10,053, or \$11,315 including overtime wages. Appellant’s current monthly budget is also addressed. These findings are directly relevant to the factors set forth in Minn. Stat. §§ 518A.39, subd. 2, 518.552 (2012). *See McConnell v. McConnell*, 710 N.W.2d 583, 585 (Minn. App. 2006) (stating that the basic consideration for a maintenance award is

“the financial need of the spouse receiving the maintenance, and the ability to meet that need balanced against the financial condition of the spouse providing that maintenance”).

With respect to the substance of the district court’s analysis, the order of January 3, 2012 reasonably concluded that appellant was entitled to a significant retroactive reduction of his maintenance obligation during his period of reduced income. However, there is substantial support in the record for the district court’s refusal to modify appellant’s ongoing maintenance obligation. While appellant highlights respondent’s reduced living expenses, noting that she claimed only \$2,733 in monthly expenses in April 2011, the district court found that respondent’s reduced budget was a result of her financial hardship resulting from appellant’s failure to pay maintenance and support. It was appropriate for the district court to consider respondent’s budget as set forth in the stipulation and the parties’ marital standard of living. *See* Minn. Stat. §§ 518A.39, subd. 2(d), 518.552, subd. 2(c); *see also Cisek v. Cisek*, 409 N.W.2d 233, 237 (Minn. App. 1987) (“Generally, an award of permanent maintenance does not imply an obligation by the spouse receiving it to become self sufficient.”), *review denied* (Minn. Sept. 18, 1987).

Appellant also argues that he has experienced increased expenses because of his relocation to Hawaii. But, the district court found that appellant’s claimed expenses were excessive beyond the marital standard of living and that he chose to move to Hawaii even though he was still a licensed pharmacist in Minnesota. The record supports this finding. Appellant does not appear to contest respondent’s assertion that he earned in excess of \$100,000 per year consistently over the course of the marriage. Despite testimony that he could not find a job in Minnesota after being terminated from a position earning an

annual salary of \$135,000 and that he was terminated from a pharmacy position in Wisconsin in early 2010 because he “didn’t have enough money” to obtain his pharmacy license, appellant was able to obtain a new license and find work in Hawaii earning an annual salary in excess of \$100,000. He conceded that obtaining his Hawaii license was “[p]retty much similar to what I had to go through with Wisconsin.” The order of January 3, 2012 correctly notes that “[appellant] now earns as much or more than he did at the time of the divorce.” Also, even though he denied doing so, respondent asserted that appellant threatened to quit his job if she sought the assistance of the state to collect her maintenance and support payments.

Based upon this record, we conclude that the district court’s findings regarding the modification of maintenance are not clearly erroneous.¹ As such, appellant failed to satisfy his burden of establishing that, aside from the period of reduced income before March 2011, the parties experienced a substantial change in their financial circumstances. No further analysis of the remaining statutory factors was required. *See Tuthill*, 399 N.W.2d at 232 (explaining that the district court is not required to make findings

¹ We note that the district court did not engage in a support calculation based upon appellant’s income from his new position in Hawaii. In context of the modification of maintenance analysis, this omission is reasonably interpreted as a determination that appellant failed to demonstrate a substantial change in circumstances regarding ongoing support, thus precluding the need to engage in an updated calculation under the guidelines. “The guidelines are inapplicable in a modification case unless the court first finds the substantial change of circumstances required for a modification order.” *State ex. rel. Johnson v. Howell*, 359 N.W.2d 629, 631 (Minn. App. 1984). “If the trial court finds that it must uphold the original order, there is no need to consider the statutory presumption of child support under the guidelines.” *Id.* As opposed to appellant’s 2010 gross income, the parties’ gross income as of March 2011 does not appear substantially different from the financial circumstances set forth in their stipulation.

regarding other statutory factors upon “appellant’s failure to present clear proof of a substantial change in circumstances”).²

3. Attorney Fees

Appellant argues that the district court abused its discretion by awarding respondent both conduct-based and need-based attorney fees. The decision to award attorney fees “rests almost entirely within the discretion of the trial court and will not be disturbed absent a clear abuse of discretion.” *Crosby v. Crosby*, 587 N.W.2d 292, 298 (Minn. App. 1998) (quotation omitted), *review denied* (Minn. Feb. 18, 1999).

[T]he court shall award attorney fees, costs, and disbursements in an amount necessary to enable a party to carry on or contest the proceeding, provided it finds:

- (1) that the fees are necessary for the good faith assertion of the party’s rights in the proceeding and will not contribute unnecessarily to the length and expense of the proceeding;
- (2) that the party from whom fees, costs, and disbursements are sought has the means to pay them; and
- (3) that the party to whom fees, costs, and disbursements are awarded does not have the means to pay them.

Nothing in this section or section 518A.735 precludes the court from awarding, in its discretion, additional fees,

² Respondent conceded at oral argument that the order of January 3, 2012 contains a mathematical error in the child support analysis. The district court’s order utilizes appellant’s gross income from 2010, which is listed as \$47,478. The order lists appellant’s average gross monthly income for 2010 as \$4,748. However, annual gross income of \$47,478 equates to average gross monthly income of \$3,956.50. The order should be modified to reflect this latter amount as appellant’s gross monthly income for purposes of the 2010 support guidelines calculation. Assuming appellant’s 2010 gross monthly income to be \$3,956.50, the child support guidelines calculator sets his support obligation at \$660, not \$725. However, given the fact that appellant’s current support obligation is \$763 per month, a support obligation of \$660 fails to satisfy Minn. Stat. § 518A.39, subd. 2(b)(1), as \$660 is not at least 20% lower than the current support order.

costs, and disbursements against a party who unreasonably contributes to the length or expense of the proceeding.

Minn. Stat. § 518.14, subd. 1 (2012). When considering an award of need-based attorney fees, “there is neither a mandate nor discretion to award such fees without those findings and the evidence to sustain them.” *Mize v. Kendall*, 621 N.W.2d 804, 810 (Minn. App. 2001), *review denied* (Minn. Mar. 27, 2001). “Conclusory findings on the statutory factors do not adequately support a fee award.” *Geske v. Marcolina*, 624 N.W.2d 813, 817 (Minn. App. 2001). “An award of conduct-based fees under Minn. Stat. § 518.14, subd. 1, may be made regardless of the recipient’s need for fees and regardless of the payor’s ability to contribute to a fee award.” *Id.* at 818.

With respect to the need-based award, the district court noted that respondent does not have the ability to pay attorney fees and that appellant’s income is over ten times her income. Appellant testified about his current debts and obligations and his general financial situation, which he described as “dire.” Many of these issues appear to be in connection with his divorce and subsequent relocation to Hawaii. However, the district court did not make any findings regarding appellant’s current net monthly income in connection with its finding that he has a reasonable monthly budget of \$4,000. Appellant claims monthly net income of approximately \$5,200. Thus, the record does not adequately support the finding that appellant has the ability to pay the fees given his total monthly support and maintenance obligations of \$3,263.

However, the award was alternatively justified as conduct-based. The district court reasonably noted that appellant made no support or maintenance payments between

July and October 15, 2011, even though appellant was earning an average income of \$12,000 per month. Presumably, appellant's compliance with the order of April 29, 2010 would have foreclosed the necessity of respondent's motion of April 29, 2011 and appellant's second motion, which resulted in the need for respondent to incur \$3,055 in fees and costs. Appellant explained that he was initially hired in Hawaii on a probationary status for 120 days due the cultural differences between dealing with customers in Hawaii and on the mainland, and that he considered "gainful employment" to mean full-time, permanent employment. However, appellant first disclosed his new employment in his affidavit filed September 6, 2011, well after 120 days past the beginning of the employment. While there would likely still have been proceedings to modify appellant's maintenance and support obligations had he provided the required notice, it is reasonable to assume that such proceedings would not have incurred attorney fees to the extent required by addressing two motions and participating in an evidentiary hearing. Thus, the district court appropriately awarded respondent conduct-based attorney fees.

Affirmed.