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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1349**

In re the Marriage of:
Mark William Carroll, petitioner,
Respondent,

vs.

Desiree Lucille Boeltl,
Appellant.

**Filed January 22, 2008
Affirmed as modified
Halbrooks, Judge**

Ramsey County District Court
File No. DM-F2-00-310

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Considered and decided by Stoneburner, Presiding Judge; Halbrooks, Judge; and
Crippen, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to
Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

HALBROOKS, Judge

Appellant challenges a district court order modifying her parenting time and child-support obligation. Appellant also challenges the district court's refusal to award judgment for her as a result of her overpayment of child support. We affirm as modified.

FACTS

This is appellant's third appeal following the parties' dissolution. Appellant Desiree Lucille Boeltl and respondent Mark William Carroll were married on May 26, 1995. The parties' dissolution judgment and decree was filed on March 14, 2000. The parties have two minor children.

The dissolution judgment incorporated the parties' marital-termination agreement that provided that they would share physical and legal custody of their children. Appellant had physical custody from June to September, and respondent had physical custody during the school year, with each party having "reasonable visitation." There was no set parenting-time schedule. The parties informally agreed that appellant would have weekends with the children during the school year and would take them to school on Monday mornings. No spousal maintenance or child support was awarded.

The parties generally kept to this agreement for the first two years. But numerous disputes prompted appellant to move in 2002 for a parenting-time schedule and child support. Respondent moved for sole physical custody. The district court ordered continuation of joint legal and joint physical custody and established a temporary access schedule for the school year. The schedule required appellant to return the children to

respondent on Sunday evenings instead of taking them to school on Monday mornings. The district court reserved the issue of the summer parenting-time schedule and referred the parties to a family-court officer for a custody and parenting-time evaluation. The family-court officer recommended that the parties maintain joint physical and legal custody and share a specific parental-access schedule during the school year and summer, but also noted that “[g]iven the [appellant’s] history of alcohol abuse and acknowledgment of on-going use, it does appear that it is in the best interests of the children for [appellant] to completely abstain from the use of alcohol.”

Appellant moved for an order adopting the family-court officer’s recommendations and for attorney fees. Respondent moved for an evidentiary hearing on his request for custody modification.

Following an evidentiary hearing, the district court denied appellant’s motion to adopt the family-court officer’s recommended schedule and her request for attorney fees. The district court granted respondent’s motion for sole legal and physical custody and ordered appellant to pay child support. The district court ordered that appellant have parenting time (1) every Tuesday from 3:30 p.m. through Wednesday at the start of school; (2) on alternate weekends from Friday at 5:00 p.m. until Sunday at 6:00 p.m.; and (3) for two uninterrupted weeks in the summer.

Appellant’s first appeal challenged the district court’s modifications of custody and parenting time and the child-support obligation. In *Carroll v. Boeltl (Carroll I)*, No. A04-1133 (Minn. App. Feb. 8, 2005), we concluded that the district court’s findings were insufficient and remanded the case to the district court.

Following remand, appellant again moved the district court for the adoption of the recommendations of the family-court officer. The district court denied appellant's motion and again granted respondent sole legal and physical custody and imposed a child-support obligation on appellant. The district court rejected the family-court officer's recommended parenting-time schedule and retained the parenting-time schedule from its previous order. Appellant again challenged the district court's order, arguing that the district court had abused its discretion and failed to make proper or adequately supported findings.

In *Carroll v. Boeltl (Carroll II)*, No. A06-91, 2006 WL 2474151 (Minn. App. Aug. 29, 2006), this court affirmed in part and reversed in part. Because the district court did not find a substantial change in circumstances that justified a change in custody and the record did not support the district court's findings regarding endangerment, we concluded that the district court abused its discretion. *Carroll II*, 2006 WL 2474151, at

*3. But we affirmed the modifications to the parenting-time schedule, stating:

Here the district court resolved the parenting-time dispute within [the statutory] framework. It made detailed findings on the same statutory factors considered by the family-court officer. It also expressly rejected the family-court officer's recommendation and provided reasons. We conclude that the district court did not abuse its discretion by rejecting the family-court officer's recommendation.

Carroll II, 2006 WL 2474151, at *4.

Following remand, appellant again moved the district court to order a parenting-time schedule consistent with the dissolution judgment and the family-court officer's recommendations. Appellant also requested (1) that the district court award her

compensatory parenting time that she claimed she was entitled to under the terms of the dissolution judgment; (2) need- and conduct-based attorney fees; and (3) a judgment for the amount of child-support payments because of the custody changes that were reversed on appeal. Respondent requested that the district court deny appellant's motions and impose a child-support obligation that included a portion of the monthly health-insurance premiums.

Following a hearing, the district court concluded that (1) appellant failed to meet her burden of proof required to modify the parenting-time schedule established by the district court and affirmed by this court in *Carroll II*; (2) appellant is not entitled to compensatory parenting time; (3) appellant is not entitled to need- or conduct-based attorney fees; (4) respondent is entitled to receive child support; and (5) future child-support payments to be made by appellant should be offset by past overpayments. This appeal follows.

D E C I S I O N

I.

Appellant contends that the district court abused its discretion by retaining the summer parenting-time schedule that provided appellant with two weeks of uninterrupted parenting-time. Appellant asserts that the district court failed to follow this court's directions in *Carroll II*. The district court has broad discretion in its determinations concerning child custody, parenting time, and child-support matters. *Matson v. Matson*, 638 N.W.2d 462, 465 (Minn. App. 2002). This court reviews those decisions for an abuse of discretion. *Id.*

Appellant mischaracterizes this court's most recent decision. Appellant contends that we directed the district court to retain only the portion of the parenting-time schedule relating to the requirement that appellant return the children by 6:30 p.m. on Sunday evenings. But in *Carroll II*, we discussed two distinct parenting-time determinations of the district court and affirmed both.

[Appellant] argues that the district court abused its discretion by rejecting the family-court officer's recommendation *and* by requiring her to return the children to [respondent] on Sunday nights during the school year. . . .

Here the district court resolved the parenting-time dispute within this framework. It made detailed findings on the same statutory factors considered by the family-court officer. It also expressly rejected the family-court officer's recommendation and provided reasons. We conclude that the district court did not abuse its discretion by rejecting the family-court officer's recommendation.

We *also* conclude that the district court acted within its broad discretion by ordering [appellant] to return the children to [respondent] on Sunday nights when she has the children for the weekend.

Carroll II, 2006 WL 2474151, at *3-*4 (emphasis added). This court affirmed both the Sunday evening return *and* the district court's rejection of the court-officer's recommendation that would have reimplemented the parenting-time schedule in the dissolution judgment. *Id.* The district court followed our holding in *Carroll II*, and we affirm the district court's order regarding parenting-time.¹

¹ Appellant also sought a specific schedule from the district court which would have conformed to the dissolution judgment. Because the holding of *Carroll II* supports the district court's order, it was also not an abuse of discretion to deny appellant's motion for the specific parenting-time schedule.

Appellant also argues that the district court modified the custody arrangement in contradiction of *Carroll II*. But again, appellant misunderstands our holding in that case. The district court ordered joint legal and physical custody following *Carroll II*. Appellant is confusing a change in parenting time with a change in custody. Appellant describes the change in parenting-time as “de facto modification of sole physical custody.” But these concepts are legally and factually distinct. “Joint physical custody does not require an absolute equal division of time; rather, it is only necessary that physical custody [of the children] be the shared responsibility of the parties.” *Lees v. Lees*, 404 N.W.2d 346, 348-49 (Minn. App. 1987) (quotation omitted). Appellant previously challenged the modification of parenting time in *Carroll II*. We have already affirmed the parenting-time schedule ordered by the district court. Appellant’s argument lacks merit, and she cannot raise an issue that has been decided previously by this court. *Loo v. Loo*, 520 N.W.2d 740, 743-44 (Minn. 1994).

II.

Appellant argues that she is entitled to compensatory parenting time for the previous four summers and that the district court’s refusal to award her compensatory parenting time is an abuse of discretion. This assertion is based on appellant’s belief that the district court improperly modified her summer parenting time.

Minn. Stat. § 518.175, subd. 6 (2006), authorizes the district court to award compensatory parenting time. Subdivision 6 allows for compensatory parenting time when a party has denied or interfered with court-ordered parenting time. Here, there is no court-ordered parenting time that has been interfered with. The district court’s

ordered parenting-time schedule was not an abuse of discretion and has been affirmed by this court in *Carroll II* and reaffirmed in this decision. As a result, appellant is not entitled to compensatory parenting time, and the district court did not abuse its discretion by denying appellant's request.

III.

Appellant contends that the district court abused its discretion in its determination that there has been a substantial change in circumstances that justifies a child-support obligation when there was no obligation in the dissolution judgment. The burden is on the moving party to show that modification of the existing support obligation is warranted due to substantially changed circumstances. *Bormann v. Bormann*, 644 N.W.2d 478, 480-81 (Minn. App. 2002). The moving party must also show that these changed circumstances render the existing award unfair and unreasonable. *Id.* The statutory language regarding child support describes presumptive substantial changes in circumstances. Minn. Stat. § 518A.39 (2006). Section 518A.39 also describes situations where the current support order is rebuttably presumed to be unreasonable and unfair. Minn. Stat. § 518A.39, subd. 2.

(a) 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

(b) It is presumed that there has been a substantial change in circumstances under paragraph (a) and the terms of a current support order shall be rebuttably presumed to be unreasonable and unfair if:

(1) the application of the child support guidelines in section 518A.35, to the current circumstances of the parties

results in a calculated court order that is at least 20 percent and at least \$75 per month higher or lower than the current support order or, if the current support order is less than \$75, it results in a calculated court order that is at least 20 percent per month higher or lower[.]

Minn. Stat. § 518A.39, subd. 2(a)-(b). Even in the absence of these presumptions, the district court may use its discretion to determine that other changes warrant modification. *Ludwigson v. Ludwigson*, 642 N.W.2d 441, 447 (Minn. App. 2002). “While section [518A.39] establishes a presumption for modification . . . it does not proscribe modification in other circumstances.” *Id.*

But the statutory scheme of section 518A.39 cannot be applied to modify a child-support obligation until January 1, 2008, unless certain criteria are satisfied. *See* Minn. Stat. § 518A.39, subd. 2(j). A change in the income of the obligor of at least 20% is required for a court to modify child support using section 518A.39 before January 1, 2008. Minn. Stat. § 518A.39, subd. 2(j)(1). Here, the district court determined that it was appropriate to apply section 518A.39 and stated:

[Appellant’s] gross yearly income has increased by over 20 percent. This increase, as well as the modification of the parenting time schedule . . . makes the waiver of child support under [the dissolution judgment] unreasonable and unfair. Minnesota Statute § 518A.39, subd. 2 allows a modification under these circumstances.

The district court applied the statutory framework and calculated appellant’s child-support obligation at \$468 per month and her medical-support obligation at \$122 per month for a total of \$590 per month. Because the terms of the dissolution judgment did not require appellant to pay any child support, the district court compared the change

from \$0 per month under the dissolution judgment to a payment of \$590 under the current framework. The district court concluded that this is a change of more than 20% per month. Based on section 518A.39, this is a substantial change in circumstances that renders the previous obligation of \$0 unreasonable and unfair and justifies the district court's modification. As a result, the district court did not abuse its discretion by imposing a monthly child-support obligation of \$590 on appellant.

IV.

Appellant argues that the denial of her motion for conduct- and/or need-based attorney fees is an abuse of discretion because she does not have the means to pay the costs necessary to carry out these proceedings and respondent has acted in a manner that justifies conduct-based fees.

Minn. Stat. § 518.14, subd. 1 (2006), allows a district court to award attorney fees for need- or conduct-based reasons. “An award of attorney fees rests almost entirely within the discretion of the [district] 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).

The district court “shall” award need-based attorney fees if it finds that the party seeking fees cannot pay their own costs, the other party has the means to pay the fees, and an award of fees is required for a good-faith assertion of the recipient's rights. Minn. Stat. § 518.14, subd. 1. A party seeking need-based fees must produce evidence that she lacks the financial resources needed to pay her own costs. *Moravick v. Moravick*, 461 N.W.2d 408, 409 (Minn. App. 1990). Here, the district court concluded that appellant is

not entitled to need-based fees, stating “[b]ased on the record before it, th[e] [district court] is unable to find a factual basis to support such an award.” The record contains no evidence that attorney fees are necessary for appellant to make a “good-faith assertion of [her] rights in the proceeding[s].” Minn. Stat. § 518.14, subd. 1. As a result, we cannot say that the district court abused its discretion in denying appellant need-based fees.

A party may also be awarded attorney fees when the district court finds that a party “unreasonably contribute[d] to the length or expense of the proceeding.” Minn. Stat. § 518.14, subd. 1. An award of conduct-based attorney fees may be ordered regardless of a party’s ability to pay. *Brodsky v. Brodsky*, 733 N.W.2d 471, 476 (Minn. App. 2007). Here, appellant argues that respondent’s two requests for a continuance of the hearing were based on misrepresentations that respondent was considering a settlement. But the district court is in the best position to make a determination of whether or not respondent unreasonably contributed to the delay or cost of a proceeding, and the district court found that the record lacks support for an award of conduct-based fees. We conclude that the district court acted within its discretion in its denial of conduct-based attorney fees.

V.

Appellant argues that the district court’s refusal to order judgment for her for the amount of her overpayment of past child support is an abuse of discretion. Appellant asserts that the district court should have issued a judgment for the amount of her overpayment instead of offsetting any future child-support obligations.

Minn. Stat. § 518A.52 (2006) regulates overpayment of child support. If an obligor has overpaid child support, the district court shall first “apply the amount of the overpayment to reduce the amount of any child support or maintenance-related arrearages or debts owed to the obligee.” Minn. Stat. § 518A.52(1). If any overpayment exists after the reduction of arrearage or debt, it reduces the obligor’s future child-support payments. Minn. Stat. § 518A.52(2). By statute, any such reduction of future child support is limited to no more than 20% of the current monthly support obligation. *Id.* The statute does not authorize a district court to issue a judgment for any overpayment amount. *See* Minn. Stat. § 518A.52.

Here, the district court found that appellant has overpaid child support in the amount of \$11,745.17. The district court first ordered that the overpayment should be reduced by \$1,635.17 for medical expenses appellant owes to respondent. The district court then determined that the child-support obligation of \$590 should be reduced to \$0 until the remaining \$10,110 overpayment is eliminated. The district court’s reduction of appellant’s future child-support obligation is proper. But pursuant to Minn. Stat. § 518A.52(2), any reduction must be limited to 20% of appellant’s child-support obligation. By application of Minn. Stat. § 518A.52(2), appellant’s child-support obligation of \$590 should be reduced by \$118 per month (to \$472 per month) until the \$10,110 overpayment has been fully credited.

Affirmed as modified.