STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1655

In re the Matter of:
Olivia Jassah Cassell, petitioner,
Respondent,

vs.

Gabriel B. Cassell,
Appellant.

Filed July 8, 2008
Affirmed in part, reversed in part, and remanded
Hudson, Judge

Ramsey County District Court
File No. FX-05-2034

Julie L. La Fleur, Amanda L. Hagen, La Fleur Law Office, P.L.L.C., 2109 County Road D East, Suite B, Maplewood, Minnesota 55109 (for respondent)

Gabriel B. Cassell, 521 Beech Street, Pottstown, Pennsylvania 19464 (pro se appellant)

Considered and decided by Hudson, Presiding Judge; Shumaker, Judge; and Schellhas, Judge.

U N P U B L I S H E D O P I N I O N

HUDSON, Judge

On appeal from the district court's decision to reopen the parties' foreign dissolution judgment, pro se appellant-husband argues (a) the district court should not have adopted respondent-wife's proposed findings of fact; (b) Minnesota courts lack

subject-matter jurisdiction to reopen the foreign dissolution judgment, should not have reopened the judgment sua sponte, and should not have added provisions to the judgment; (c) the record does not support the determination that the judgment was based on fraud; (d) the discharge of the guardian ad litem (GAL) before the GAL completed her statutory duties deprived husband of due process of law; (e) the district court improperly refused to consider father's motion and affidavit regarding custody and parenting time, and its decisions on those issues were not supported by the record; (f) the custody and parenting time decisions deprived father of due process of law; (g) his parenting time should not have been supervised; (h) the district court abused its discretion in awarding mother attorney fees; (i) his motion for amended findings of fact should not have been denied; (j) the district court abused its discretion in setting father's current support obligation and ordering retroactive support. We affirm in part, reverse in part, and remand.

FACTS

Appellant Gabriel Cassell and respondent Olivia Cassell were married in 1993 in Abidjan, Ivory Coast. Appellant and respondent had one child together, L.A.C., who was born in 1998. Appellant left the Ivory Coast in 1999 and moved to the United States. Appellant returned to the Ivory Coast briefly in 2001 before going back to the United States and joining the U.S. Navy. Appellant again returned to visit respondent and their child in March 2003.

In 2003, respondent contacted the U.S. Navy asking for its assistance in obtaining financial support from appellant. Appellant began sending financial support to

respondent in June 2003 after being required to do so by the U.S. Navy. Shortly thereafter, appellant resigned from the Navy.

In June 2003, appellant filed for divorce from respondent in Pennsylvania. In the divorce petition, appellant did not mention the existence of their child, L.A.C. And despite having visited respondent in the Ivory Coast in March 2003, appellant indicated that he did not know respondent's current address, and he moved to allow service of the petition by publication in Pennsylvania. The notice was served by publication in July 2003. The Pennsylvania court issued the divorce decree in August 2003.

Respondent was apparently unaware of the divorce petition, and until notified by appellant, was unaware of the dissolution of their marriage. In March 2004, respondent and the child moved to Minnesota as refugees to escape political violence in the Ivory Coast. Respondent and the child have lived in Minnesota since 2004.

In June 2005, respondent filed a petition in Ramsey County District Court requesting that appellant be adjudicated the father of L.A.C.; respondent be given sole legal and physical custody of L.A.C.; the issue of parenting time be reserved; appellant be ordered to pay child support; appellant be ordered to contribute toward respondent's reasonable child-care costs; appellant be ordered to pay child-support arrearages for 2003 and 2004; child support be obtained by withholding appellant's income under Minn. Stat. § 518.6111 (2004); appellant be ordered to provide medical, dental, and health-insurance coverage for L.A.C.; and appellant be ordered to pay respondent's attorney fees.

In March 2006, appellant filed a "Responsive Notice of Motion and Motion to Establish Custody and Parenting Time" in Ramsey County District Court. Appellant

requested that he and respondent be granted joint legal custody; respondent be granted sole physical custody; he be granted unsupervised parenting time; he be required to pay $140 per month child support; and the district court deviate from the guideline support amount under Minn. Stat. § 518.551 (2004). In the accompanying affidavit, appellant denied intentionally omitting the existence of the child from the marriage-dissolution documents for the purpose of avoiding paying child support, and stated: "I entrusted the divorce proceedings to an organization in my home state of Pennsylvania, to whom I did convey that we did have a child. I had no knowledge of the contents of divorce documents, and did not realize until much later the child's name was omitted."

The district court filed its findings of fact, conclusions of law, order and judgment in March 2006, which it later amended in April 2006. In its April 2006 amended order, the district court found that appellant's assertion that he did not know the child should have been included in the Pennsylvania dissolution papers was "not credible."

The district court concluded that Minnesota had jurisdiction over the matter under Minn. Stat. § 257.59, subd. 1, and Minn. Stat. § 518C.201 (2), (7) (2004). The district court also found that appellant is the child's father and has a duty to provide support for the child. The district court adjudicated appellant the father of L.A.C., awarded sole physical custody to respondent, and awarded joint legal custody to appellant and respondent. The district court denied appellant's request for parenting time in Pennsylvania and ordered that he "retain the services of an agency to assist in the unification between him and the minor child for the next two years." The district court also ordered that appellant pay (1) $412 per month in ongoing child support; (2) $82.40

per month for reimbursement for past support for the minor child; (3) $55.50 or 50% of the monthly premiums for the child's medical and dental insurance; and (4) $228.19 every two weeks until respondent enrolled in public-assistance child-support services; (5) $12,772 in child-support arrearages ($412 per month from September 1, 2003 until April 1, 2006); and (6) $750 for need- and conduct-based attorney fees.

In October 2006, appellant filed a motion to modify child support, requesting that his child support and arrearage payment be decreased. In the supporting affidavit appellant stated that he could not meet his financial obligations and that "[w]ithout a reduction in child support, I risk defaulting on some of my loan payments and risk losing my job. The district court did not consider the fact that I already had a minor child prior to establishing the order [or] consider my living expenses."

In November 2006, appellant filed a notice of motion and motion to reconsider. Appellant requested that the district court (1) award the parties joint legal and physical custody; (2) vacate the order that he pay child-support arrearages; (3) set child support using the *Hortis-Valento* formula; and (4) require respondent to provide appellant with the child's social security number, birth certificate, and green card. Respondent filed a notice of countermotion and countermotion requesting that the district court (1) deny appellant's motion; (2) enforce its order; and (3) award respondent attorney fees.

A hearing on appellant's motion to modify child support was heard before a child support magistrate (CSM) in December 2006. In January 2007 the CSM issued its order denying appellant's motion, stating that:

> [appellant's] motion to modify child support has no basis in law or fact. He has maintained the same employment since the time of the Amended Findings of Fact, Conclusions of Law, and Order for Judgment dated April 4, 2006, and has not had a change in circumstances. He incorrectly asserts that a subsequently born child should now be considered, and he incorrectly asserts that his spouse's income is relevant to this proceeding.

In February 2007, the district court issued an order setting an evidentiary hearing before a district court referee for May 2007. The order indicated that:

> [t]he issues to be tried are: Legal and physical custody, parenting time and parenting time issues; child support; past child support claimed owed; *Hortis/Valento* formula application if supported by law; removal of the child from the Continental United States (application to the Court); access to copies of records, i.e., Social Security card, birth certificate, permanent residence card (green card).

In March 2007, appellant attempted to file a notice of motion and motion to vacate with the district court as well as an affidavit and several exhibits. The district court returned the documents to appellant along with a letter that stated:

> Please note that these documents <u>have not</u> been filed with the court. As you will recall, at a hearing heard on February 12, 2007, the court ordered that the above entitled matter would be scheduled for a two day trial. Additionally, the court issued an Order for Trial which was filed by the clerk of court on February 15, 2007.
>
> . . . .
>
> You have requested that the court schedule a hearing addressing your request to vacate the Amended Findings of Fact, Conclusion of Law dated April 4, 2006. Please understand that, essentially, the court is re-hearing all of the issues that were before the court, by way of hearing, on March 27, 2006. Your request to vacate the Amended Findings of Fact, Conclusion of Law dated April 4, 2006 is

> not appropriate at this time and the request to have a hearing for these issues to be addressed is denied.

In May 2007, the district court appointed a Guardian ad Litem (GAL) to represent the interests of L.A.C. and to advise the court on the issues of custody and parenting time. Twenty days later, the district court issued an order discharging the GAL and stating that "[t]he court finds that the guardian ad litem has fulfilled the duties and obligations assigned by the court."

In June 2007, appellant wrote to the district court expressing his "utter amazement at the sudden discharge of the Guardian Ad Litem appointed to represent the best interests of my daughter." Appellant objected to the discharge of the GAL and stated that he considered the discharge "to be a denial of due process for my child and me." In a letter to appellant, the district court stated that:

> The last day of trial in this matter was May 15th, 2007. After [respondent] had presented her case, you were called upon to then present your case. You quit your case when you stated to the Court, on the record, that you had no evidence to offer—no testimony by your own words, by witnesses, or by documents to be submitted to the Court.
>
> One of the principle issues in the trial was the custody and parenting time of your minor child.
>
> Once you quit your case and advised the Court that you had no evidence to submit to the Court, the issue concerning parenting time ceased to be a viable issue before the Court.
>
> Once you quit your case and the issue concerning parenting time ceased to be an issue before the Court, there was no further need for the services of a Guardian ad Litem. The Guardian ad Litem, as you know, wrote the Court on May 21st, 2007 requesting directions from the Court as to

> what duties she should discharge or carry out. There were no duties for her to carry out.

In July 2007, the district court issued its 35-page findings of fact, conclusions of law, order, and judgment. The district court found that "[appellant] fraudulently omitted the existence of the minor child from the Complaint dated June 30, 2003 filed in Pennsylvania and therefore, the issues of parentage, child custody, parenting time and support were not addressed." The district court found that appellant provided respondent and the child with very little voluntary financial support and did not make any effort to bring respondent and the child to the United States. The district court stated that appellant "omitted the minor child's existence when he filed for divorce in Pennsylvania leaving the child in an illegitimate state. [Appellant] knowingly severed his own parental rights by his own fraudulent actions." The district court continued, "[appellant] neither corrected the defective divorce decree nor took any actions to secure custody, parenting time or to reestablish his parental rights until [respondent] commenced these proceedings."

The district court also found that "[respondent] provided credible testimony and evidence regarding her care of the minor child, [appellant's] abandonment of her and the minor child in Africa, the events that led up to their immigration to the United States and thereafter plus her income and expenses." The court also found that

> [a]fter [respondent] rested her case in chief, [appellant] verbally waived his right to testify and present his evidence and asked to move right to closing. [Appellant] quit his case mid trial. [Appellant] provided nothing to substantiate his opening statements. The Court instructed the parties to submit their closing arguments in writing and to provide a

> proposed Findings of Fact, Conclusions of Law and Order for Judgment. The Court clearly instructed the parties that no new evidence or testimony would be allowed.

The district court found that "[appellant's] closing arguments contained evidence not supported by the record or from his case. [Appellant] voluntarily waived his right to present his case and present evidence." This appeal follows.

Respondent moved this court to strike appellant's brief and appendix and to dismiss the appeal. This court denied respondent's motions.

D E C I S I O N

Appellant seeks review of the district court's July 2007 judgment but did not provide a transcript of the May 2007 evidentiary hearing upon which that judgment was based. If a transcript is not provided, appellate review is limited to consideration of whether the district court's conclusions of law are supported by the findings of fact. *Duluth Herald & News Tribune v. Plymouth Optical Co.*, 286 Minn. 495, 498, 176 N.W.2d 552, 555 (1970).

I

Appellant argues that "[t]he district court clearly lacked subject matter jurisdiction over the Pennsylvania dissolution decree" and that the record does not support the finding that the Pennsylvania decree was fraudulent. We disagree.

This court reviews questions of subject matter jurisdiction de novo. *Burkstrand v. Burkstrand*, 632 N.W.2d 206, 209 (Minn. 2001). "[A]s a general matter, foreign dissolution decrees are entitled to full faith and credit from the Minnesota courts."

Mahoney v. Mahoney, 433 N.W.2d 115, 119 (Minn. App. 1998), *review denied* (Minn. Feb. 10, 1999). But there are limited bases for reopening a dissolution judgment:

> (1) mistake, inadvertence, surprise, or excusable neglect;
> (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under the Rules of Civil Procedure, rule 59.03;
> (3) fraud, whether denominated intrinsic or extrinsic, misrepresentation, or other misconduct of an adverse party;
> (4) the judgment and decree or order is void; or
> (5) the judgment has been satisfied, released, or discharged, or a prior judgment and decree or order upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment and decree or order should have prospective application.

Minn. Stat. § 518.145, subd. 2 (2006). Relief from a dissolution judgment must be based on the existence of one or more of these statutory conditions. *Shirk v. Shirk*, 561 N.W.2d 519, 522 (Minn. 1997). The party seeking to reopen the judgment bears the burden of proof. *Haefele v. Haefele*, 621 N.W.2d 758, 765 (Minn. App. 2001), *review denied* (Minn. Feb. 21, 2001).

A district court's finding of fact as to whether a judgment was the result of mistake or fraud will not be set aside unless it is clearly erroneous. *Hestekin v. Hestekin*, 587 N.W.2d 308, 310 (Minn. App. 1998). Because of the limited record on appeal, we do not consider appellant's argument that the district court's finding that the Pennsylvania judgment was based on fraud was clearly erroneous. *Duluth Herald*, 286 Minn. at 498, 176 N.W.2d at 555.

Furthermore, under the Uniform Interstate Family Support Act (UIFSA), if only one tribunal has issued a child-support order, "the order of that tribunal is controlling and

must be recognized." Minn. Stat. § 518C.207 (a) (2006). Pennsylvania has adopted UIFSA. *Morrissey v. Morrissey*, 713 A.2d 614, 616 n.3 (Pa. 1998) (citing 23 *Pa. Cons. Stat.* §§ 7101–7802). Here, the Pennsylvania court, based on appellant's apparent intentional misrepresentations regarding his minor child, did not issue a child-support order; therefore, Minnesota's child-support order is the first one and should be recognized under the UIFSA.

The district court also has the authority to address parentage, custody, and child-support issues under Minn. Stat. § 518.145, subd. 2, which provides that a district court may "entertain an independent action to relieve a party from a judgment and decree, order, or proceeding or to grant relief to a party not actually personally notified as provided in the Rules of Civil Procedure, or to set aside a judgment for fraud upon the court." We construe respondent's June 2005 petition as an "independent action" brought to relieve respondent from the Pennsylvania court's failure to address the parentage and custody issues. Accordingly, we conclude that the district court had jurisdiction to address the parties' parentage, custody, and child-support issues.

II

Appellant argues that the district court improperly adopted respondent's proposed findings of fact verbatim and that it therefore did not independently examine the facts. We disagree.

Although verbatim adoption of a party's proposed findings and conclusions of law is not per se reversible error, total adoption of one party's findings and conclusions raises questions of whether the district court independently evaluated each party's testimony

and evidence. *Bliss v. Bliss*, 493 N.W.2d 583, 590 (Minn. App. 1992), *review denied* (Minn. Feb. 12, 1993). The Minnesota Supreme Court has declined to prohibit district courts from adopting proposed findings verbatim but it prefers that a court independently develop its own findings. *In re Children of T.A.A.*, 702 N.W.2d 703, 707 n.2 (Minn. 2005). The best indication of a district court's independent assessment of the evidence is a court's exercise of its own skill and judgment in drafting its findings. *Id.*

If, after review, this court concludes that the district court's findings are not clearly erroneous, the verbatim adoption of those findings, standing alone, will not constitute sufficient grounds for reversal. *Dukes v. State*, 621 N.W.2d 246, 259 (Minn. 2001). Because of the lack of transcript in this case, and the consequent narrow scope of review, we conclude that reversal on this issue is not warranted.

III

Appellant argues that the discharge of the GAL violated his right to due process because she was dismissed before she had time to carry out her statutory duties. We disagree.

As noted by the district court, the GAL was not dismissed until after the May 2007 evidentiary hearing at which appellant failed to present any documentary or testimonial evidence. Additionally, because there are no allegations or facts supporting the existence of child abuse in this case, appointment of a GAL was discretionary under Minn. Stat. § 518.165, subd. 1 (2006) ("In all proceedings for child custody or for dissolution or legal separation where custody or parenting time with a minor child is in issue, the court may appoint a guardian ad litem from a panel established by the court to represent the interests

of the child."). Finally, appellant does not explain how the district court's dismissal of the GAL violated his right to due process or showed that the district court's decision was not impartial or independent. We note that retaining the services of a GAL, especially in light of the complex nature of this case, may have been helpful. But on this record, we see no basis for overturning the district court's dismissal of the GAL.

IV

Appellant argues that the district court improperly refused to consider appellant's motion and affidavit regarding custody and parenting time and that its decisions on those issues were not supported by the record. The lack of a transcript limits our review of this issue.

Custody

We review a district court's custody determination for an abuse of discretion. *Silbaugh v. Silbaugh*, 543 N.W.2d 639, 641 (Minn. 1996).

When determining custody, a district court must consider the best interest of the child using the factors listed in Minn. Stat. § 518.17, subd. 1 (2006):

> (1) the wishes of the child's parent or parents as to custody;
> (2) the reasonable preference of the child, if the court deems the child to be of sufficient age to express preference;
> (3) the child's primary caretaker;
> (4) the intimacy of the relationship between each parent and the child;
> (5) the interaction and interrelationship of the child with a parent or parents, siblings, and any other person who may significantly affect the child's best interests;
> (6) the child's adjustment to home, school, and community;
> (7) the length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity;

> (8) the permanence, as a family unit, of the existing or proposed custodial home;
> (9) the mental and physical health of all individuals involved . . . ;
> (10) the capacity and disposition of the parties to give the child love, affection, and guidance, and to continue educating and raising the child in the child's culture and religion or creed, if any;
> (11) the child's cultural background;
> (12) the effect on the child of the actions of an abuser, if related to domestic abuse . . . ; and
> (13) except in cases in which a finding of domestic abuse . . . has been made, the disposition of each parent to encourage and permit frequent and continuing contact by the other parent with the child.

In its July 2007 order, the district court found that

> The Amended Order award of sole physical custody without an evidentiary hearing was due to the fact [that] physical custody was not contested at that time. [Appellant] provided no evidence or testimony that the minor child is endangered in [respondent's] care or how a modification would serve the best interests of the minor child.

The district court also found that "[respondent] is involved in every moment of her daughter's life and has been since birth" and that "[appellant] did not present any new or refuting testimony or evidence at trial regarding the minor child's primary caretaker." The district court did not find appellant's claim of an intimate relationship with the child to be credible and stated that "[appellant's] actions, past and present, have greatly affected the intimacy of the relationship between him and his daughter." The district court also found that the child had known only one home, and that respondent had "provided a stable and loving environment for the minor child, despite [appellant's] absences since the minor child was one year of age." The district court noted that

appellant did not act to bring his daughter to the United States, "[o]n the contrary, [appellant] chose to abandon his minor child in a country rife with political unrest and insurgence and provided no voluntary financial support after he obtained the fraudulent marriage dissolution." The district court also found that, based on an analysis of the factors listed in Minn. Stat. § 518.17, subd. 2 (2006), joint physical custody was not in the best interests of the child. The district court's findings support its legal conclusions regarding custody, and it did not abuse its discretion by granting sole physical custody to respondent.

Parenting time

Noting, among other things, the limited contact appellant has had with L.A.C., the district court denied appellant's motion for parenting time in Pennsylvania. The court (1) ordered supervised parenting time in Minnesota at the Children's Safety Center or other agreed-upon facility at appellant's sole expense; (2) appointed a parenting-time consultant; and (3) ordered that appellant shall have parenting time in Minnesota upon giving 48 hours' notice to respondent and securing approval of the parenting-time consultant. Although appellant challenges the parenting-time order as a whole, the heart of his argument is that the district court abused its discretion by ordering supervised parenting time at the Children's Safety Center even though there was no evidence of domestic abuse or other mistreatment in the record. We agree with his contention.

The district court has broad discretion in deciding parenting-time issues, and this court will reverse that decision only upon an abuse of that discretion. *Olson v. Olson*, 534 N.W.2d 547, 550 (Minn. 1995).

Here, the district court found that

> [w]hen [appellant] obtained the fraudulent marriage dissolution in Pennsylvania, by not including the minor child, he severed his own rights to his minor child. [Appellant] had no legal right or presumption of parenting time. Any award of parenting time by this Court, in Minnesota or elsewhere, supervised or not, would be more parenting time than [appellant] was either entitled to or exercising.

The district court also noted that since April 2006, appellant has only had parenting time with the child three times "despite being afforded the opportunity to basically travel to Minnesota and see his child any time he chose only by giving 48 hours notice."

While the district court's findings support its legal conclusions, there is nothing in the record, such as a history of abuse, which would warrant such a limited parenting-time allowance. The paramount concern in parenting-time and custody matters is the welfare of the child. *Olson*, 534 N.W.2d at 549. Although we do not condone appellant's conduct, we conclude that the district court's parenting-time decision—which appears to be focused on penalizing appellant's conduct—arguably harms the child by unduly limiting her relationship with appellant. Therefore, we reverse and remand the parenting-time determination for further consideration and note that the district court may reopen the record at its discretion.

V

Appellant argues that the district court abused its discretion in awarding respondent need- and conduct-based attorney fees. We disagree.

A district court "has such broad discretion in the awarding of attorney's fees that a reviewing court will rarely reverse the trial court on that issue." *Rosenberg v. Rosenberg*,

379 N.W.2d 580, 587 (Minn. App. 1985), *review denied* (Minn. Feb. 19, 1986). Under Minn. Stat. § 518.14, subd. 1 (2006), a district court shall award need-based attorney fees if 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.

Here, the district court ordered appellant to pay respondent $13,920.47 in "need and conduct-based attorney[] fees" but did not allocate the total attorney fee award between the need- and conduct-based fees. The district court found that appellant "has the ability to contribute to [respondent's] legal fees and costs" and that respondent was entitled to fees on a need basis.

But the district court also found that appellant's monthly expenses exceed his net monthly income. This finding appears to contradict the district court's determination that appellant is able to pay respondent's attorney fees—at least in respect to an award of need-based attorney fees. That said, "[n]othing in [§ 518.14] precludes the court from awarding, in its discretion, additional fees, costs, and disbursements against a party who unreasonably contributes to the length or expense of the proceeding." Minn. Stat. § 518.14, subd. 1. 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." *Geske v. Marcolina*, 624 N.W.2d 813, 818 (Minn.

App. 2001). To award conduct-based fees, the court must identify the offending conduct, and the conduct must have occurred during litigation. *Id*. at 818–19. An award of conduct-based 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).

Here, the district court found that "[appellant's] conduct at trial . . . has caused [respondent] to incur an exceptional amount of attorney's fees. To date [respondent] has incurred a total of $17,095.40 in legal fees and costs mostly due to [appellant's] actions."

> [Appellant] continues to abuse this Court and legal processes with his numerous and persistent letters, motions, abuse of the Court's subpoena power, abuse of open access to the Court, all of which causes fees to [respondent]. [Appellant] has repeatedly and improperly contacted the court in an effort to persuade and threaten the court to vacate its earlier findings and chooses to pursue legal decisions not properly before the court despite being repeatedly told the same . . . . [Respondent] should not have to bear the financial burden of [appellant's] repeat gross abuse of our legal system.

Therefore, although the record does not appear to support an award of need-based attorney fees, the district court's findings clearly support an award of conduct-based attorney fees, and we affirm the district court's entire fee award of $13,920.47 as conduct-based attorney fees.

VI

Appellant argues that the district court abused its discretion by denying his March 2007 motion to vacate the April 2006 amended findings of fact. We disagree.

Respondent argues that the district court's denial of appellant's motion to vacate is not appealable. Generally, an order denying a motion to vacate a final judgment is not appealable; instead, only the original judgment is appealable. *Angelos v. Angelos*, 367 N.W.2d 518, 519 (Minn. 1985). "But when an appeal is properly taken from the underlying judgment under Minn. R. Civ. App. P. 103.04, the appellate court has discretion to review a subsequent, nonappealable order denying a motion to vacate." *In re Marriage of Rettke*, 696 N.W.2d 846, 850 (Minn. App. 2005). Therefore, in its discretion, this court may review the district court's decision to deny appellant's motion to vacate.

The district court has broad discretion in deciding whether to grant or deny a motion to vacate. *Northland Temporaries, Inc., v. Turpin*, 744 N.W.2d 398, 402 (Minn. App. 2008), *review denied* (Minn. Apr. 29, 2008). In denying appellant's motion to vacate, the district court stated in a letter

> Please note that these documents have not been filed with the court. As you will recall, at a hearing heard on February 12, 2007, the court ordered that the above entitled matter would be scheduled for a two day trial. Additionally, the court issued an Order for Trial which was filed by the clerk of court on February 15, 2007.
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> You have requested that the court schedule a hearing addressing your request to vacate the Amended Findings of Fact, Conclusion of Law dated April 4, 2006. Please understand that, essentially, the court is re-hearing all of the issues that were before the court, by way of hearing, on March 27, 2006. Your request to vacate the Amended Findings of Fact, Conclusion of Law dated April 4, 2006 is

> not appropriate at this time and the request to have a hearing for these issues to be addressed is denied.

As noted by the district court in its letter to appellant, the issues he raised in his March 2007 motion were already effectively before the district court and scheduled to be considered at an evidentiary hearing in May 2007. Therefore, appellant's argument that the district court denied him due process because it "exclu[ded] critical evidence from the record" is without merit. Because the April 2006 order was already scheduled to be reconsidered by the court, we conclude that the district court's decision to deny appellant's March 2007 motion to vacate is amply supported by the record.

VII

Appellant argues that he district court abused its discretion in setting appellant's child-support obligations. We agree.

District courts have broad discretion when setting child support. *Rutten v. Rutten*, 347 N.W.2d 47, 50 (Minn. 1984). A district court abuses its discretion if it improperly applies the law or clearly errs by establishing child support in a manner that is against logic and the facts on the record. *Id.*

In parentage proceedings, child support is set under chapter 518. *See* Minn. Stat. § 257.66, subd. 3 (2004) (requiring certain matters in parentage proceedings, including child support, to be determined under chapter 518 (Minn. Stat. § 518.551 (2004 & Supp. 2005)).[1] Under chapter 518, there is a rebuttable presumption that the child-support

[1] Although the child-support laws changed substantially on January 1, 2007, those amendments do not apply in this case because the district court established the child support and the parties filed their motions before the changes became effective. *See* 2006

guidelines are applicable in "all cases." Minn. Stat. § 518.551, subd. 5(i) (2004). Generally, the obligation to pay child support is based on the obligor's ability to pay. *Schneider v. Schneider*, 473 N.W.2d 329, 332 (Minn. App. 1991).

Monthly child-support obligation

Here, the district court found that after deductions for taxes, medical insurance, pension, and union dues, appellant had average monthly wages of $1,648.10. The district court found that appellant's guideline child-support obligation was $412 per month. The district court also concluded that no deviation from the guideline support amount was warranted. The district court stated that "[appellant's] subsequent born child shall not be considered pursuant to 2006 law in calculating his child support obligation."

It is true that "[c]hildren by a subsequent marriage, while relevant to a [district] court's decision, are not to be factored into the child support guideline tables in Minn. Stat. § 518.551, subd. 5." *Erickson v. Erickson*, 385 N.W.2d 301, 304 (Minn. 1986). But this court has previously held that "the [district] court can consider the obligor's current family obligations in determining the obligor's available resources." *Hayes v. Hayes*, 473 N.W.2d 364, 365 (Minn. App. 1991). The method for addressing a support obligor's subsequent children is codified at Minn. Stat. § 518.551, subd. 5f (2004) and requires, among other things, that the obligor's expenses be "reduced as appropriate to take into account contributions to [the costs of the obligor's household] by other adults who share

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Minn. Laws ch. 280, § 44, at 1145; *compare* Minn. Stat. § 518.551 (2004) *with* Minn. Stat. §§ 518A.34, .35 (2006). Because this court applies the law in effect at the time that the district court considered the motions, the 2004 and 2005 statutes apply. *See McClelland v. McClelland*, 393 N.W.2d 224, 226–27 (Minn. App. 1986).

the obligor's current household" and that the expenses for subsequent children be reduced "as appropriate to take into account the ability to contribute to those needs by another parent of the children[.]" Minn. Stat. § 518.551, subd. 5f(1)(i), (ii), (2).

The district court found that appellant's monthly expenses totaled $2,868.82, which included expenses for his current wife and subsequently born child, $109 for repayment of a personal loan, $230.98 for repayment of another loan, military debt in the amount of $60 and $238.24 for credit-card debt.

The district court concluded that appellant has a duty to provide support for his child, but the district court does not explain how it found that appellant was able to provide child support when his monthly expenses are greater than his monthly income. Because the district court's factual findings do not support its legal conclusions, we conclude that the district court abused its discretion in setting appellant's monthly child-support obligation and reverse and remand this issue for further consideration.

Retroactive child-support obligation

The district court also stated that appellant should pay child support retroactive to the date of the parties' marriage dissolution:

> [Appellant] needs to be held responsible for the omission of the minor child from his divorce decree. It is reasonable that if [appellant] included the minor child, child support would have been ordered. If [appellant's] child support were not ordered retroactive to the date of the marriage dissolution, it would only reward him for his fraudulent omission.

The district court calculated this total amount to be $12,772.

But as appellant notes, "[g]enerally, where no prior order to pay child support exists, it is improper to give a support order retroactive effect." *Davis v. Davis*, 631 N.W.2d 822, 827 (Minn. App. 2001); *Paulson v. Paulson*, 381 N.W.2d 53, 55 (Minn. App. 1986) (reversing and remanding where the district court ordered retroactive child support when there was no previous child-support order, noting that "the trial court has the discretion to make a support modification retroactive only when the obligor has not substantially complied with the previous order."). Therefore, because there was no previous child-support order in this case, we conclude that the district court had no legal basis for ordering retroactive child-support payments.

To summarize, we reverse and remand to the district court its determinations on parenting time and child support. The district court may reopen the record on these issues at its discretion. We reverse outright the retroactive child-support obligation. The remaining determinations are affirmed.

Affirmed in part, reversed in part, and remanded.