STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1251

In re the Custody of R. H. P., d.o.b. 11/20/2002:

Monty Marcel Prow, petitioner,
Appellant,

vs.

Trisha Harris Ball,
Respondent,

Dorothy Gause, guardian ad litem,
Respondent,

County of Dakota,
Respondent.

Filed May 11, 2010
Affirmed
Shumaker, Judge

Dakota County District Court
File No. 19-FO-03-012712

Andrew M. Silverstein, Andrew M. Silverstein Law Office, L.L.C., Wayzata, Minnesota (for appellant)

Jenny L. Ryan, Dakota County Legal Services, Apple Valley Minnesota (for respondent)

Eric Rehm, Burnsville, Minnesota (for respondent/guardian ad litem)

James C. Backstrom, Dakota County Attorney, James W. Donehower, Assistant County Attorney, West St. Paul, Minnesota (for respondent County of Dakota)

Considered and decided by Ross, Presiding Judge; Shumaker, Judge; and Randall, Judge.*

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

SHUMAKER, Judge

Appellant challenges the district court's custody and child support determinations, arguing that he did not get a fair trial because the district court abused its discretion in imposing discovery sanctions and making various evidentiary rulings. We affirm.

FACTS

This is an appeal from a child custody matter. Respondent Trisha Harris Ball and appellant Monty Marcel Prow have one child together, born in November 2002. In 2003, the parties entered into an agreement to share joint physical and joint legal custody.

In September 2007, appellant was charged with felony possession of a controlled substance after police searched his home and found illegal drugs in the residence. Respondent petitioned for an order for protection (OFP) on behalf of the child against appellant because of the drug issue, and because appellant allegedly had sexual contact with the child. The district court determined that appellant had sexual contact with the child and granted an order for protection against appellant for three months.

On November 26, 2007, respondent moved for a change of custody and modification of child support, alleging that the child was endangered because of the sexual contact between appellant and the child, and because of appellant's use of illegal

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

drugs and the accessibility of the drugs to the child in appellant's home. The district court awarded temporary sole legal and sole physical custody of the child to respondent and temporarily set appellant's child support obligation. Dorothy Gause, Esq., was appointed as a guardian ad litem (GAL), on January 22, 2008.

The custody matter was heard in November 2008, and the district court found that respondent testified credibly as to statements the child made to her about appellant. The district court also found that the child's play therapist testified credibly as to statements made to her by the child while the child drew in a good-touch, bad-touch coloring book. The GAL testified, as an expert witness, that the procedure she followed in this case was consistent with the standard procedure she would follow in any similar case. The GAL recommended, and the district court ordered on numerous occasions throughout the proceedings, that the appellant undergo chemical-dependency and psychosexual evaluations. Appellant never completed these evaluations. The district court excluded the testimony of two of appellant's experts.

The district court granted respondent's motion for custody modification, awarding sole physical and sole legal custody to respondent and denying parenting time to appellant until he completed a chemical-dependency evaluation, psychosexual evaluation, and a reunification assessment. The district court denied appellant's post-hearing motions. An expedited child-support hearing took place on March 12, 2009. The district court reviewed that hearing in June 2009 and determined appellant's child-support obligation. The district court also granted respondent's motion for attorney fees and costs.

This appeal followed.

D E C I S I O N

I.

Appellant's main contention is that he did not get a fair trial, raising numerous discovery and evidentiary issues. Appellant moved for a new trial, and the district court denied the motion. We agree with the district court that none of the issues raised by appellant warrant a new trial.[1]

Only matters adversely affecting the substantial rights of a party constitute reversible error. *Sausser v. Republic Mortgage Investors*, 269 N.W.2d 758, 761 (Minn. 1978); *see* Minn. R. Civ. P. 61 (requiring courts to disregard harmless error); *Wibbens v. Wibbens*, 379 N.W.2d 225, 227 (Minn. App. 1985) (refusing to remand for deminimus error).

[1] We recognize that motions to modify child support and custody are "special proceedings," not trials. *See Angelos v. Angelos*, 367 N.W.2d 518, 520 (Minn. 1985) (determining that final orders granting or denying modifications of child support or custody are appealable as of right). Thus, a motion for a new trial after an order granting a motion to modify child support and custody is not authorized. *Huso v. Huso*, 465 N.W.2d 719, 721 (Minn. App. 1991). A district court cannot abuse its discretion by denying a motion that is not authorized. *See id.* (dismissing an appeal of an order denying a motion for a new trial that was made after an order denying modification of child support and spousal maintenance). Accordingly, we now dispose of the "new-trial" issue, but still consider, as the district court did, whether the errors alleged by appellant fatally flawed the underlying proceeding. *See Charson v. Temple Israel*, 419 N.W.2d 488, 491 (Minn. 1988) (stating, in the context of vacating a judgment, that "ordinarily courts are loath to 'punish' the innocent client for the counsel's neglect").

Stay of the proceedings

Appellant argues that the district court should have stayed the custody-modification proceeding until final orders were given in appellant's criminal case for possession of controlled substances and an appeal involving respondent's order for protection against appellant.

The district court has inherent power to grant a stay of a proceeding, independent of statutory authority. *Town of Stillwater v. Minnesota Mun. Comm'n*, 300 Minn. 211, 219 n.6, 219 N.W.2d 82, 87 n.6 (1974) (quotation omitted). It is within the district court's discretion to stay a proceeding, and we will reverse only for an abuse of that discretion. *Real Estate Equity Strategies LLC v. Jones*, 720 N.W.2d 352, 358 (Minn. App. 2006) (quotation omitted). The test for whether an abuse of discretion has occurred is "whether a denial of a continuance would prejudice the outcome of the trial." *Id.*

Appellant argues that the district court should have granted a stay of the custody proceeding because "the criminal case against appellant and the domestic abuse proceeding involving [a]ppellant and [r]espondent involve similar facts and related claims and acquired jurisdiction of the matter before the custody modification proceeding was initiated in the trial court." That there were other proceedings in process neither compels the stay of the custody matter, which is the most urgent and sensitive of the three proceedings, nor supports in any respect the proposition that the district court abused its discretion by denying a stay. Furthermore, we are unable to review the particulars of the motion to stay because appellant has provided no transcript of the May 20, 2008 hearing after which the court stated in its order that "[a]ll other motions not addressed in this

Order are denied." The court did not expressly mention the motion to stay, but, because the custody proceeding went forth, it is clear that the court denied the motion. Without a transcript upon which to review the basis for the denial, we are left with the argument noted above. It is thoroughly unpersuasive and we do not presume undemonstrated error. An appellant is responsible for providing any transcript necessary for appellate review. Minn. R. Civ. App P. 110.02, subd. 1; *Noltimier v. Noltimier*, 280 Minn. 28, 29, 157 N.W.2d 530, 531 (1968) (stating that "[e]rror cannot be presumed" when the appellant fails to provide an adequate record for review of issues raised on appeal).

Imposition of discovery sanctions

Appellant contends that the district court abused its discretion by not allowing his chosen doctor to evaluate him, by excluding his expert witnesses, by imposing rebuttable presumptions against him, and by denying him access to the child's therapy records. However, given appellant's failure to comply with the court's orders to undergo psychosexual and chemical-dependency evaluations, we disagree.

A district court has broad discretion to issue discovery orders which will not be disturbed on appeal absent a clear abuse of that discretion. *Shetka v. Kueppers, Kueppers, Von Feldt & Salmen*, 454 N.W.2d 916, 921 (Minn. 1990). Discovery orders can include court-ordered physical and mental examinations. *See* Minn. R. Civ. P. 26.02 (allowing discovery of physical and mental examinations); Minn. R. Civ. P. 35.01 (allowing the court to order physical and mental examinations). The district court must be given discretion to determine appropriate sanctions for a violation of discovery rules, as it is in the best position to evaluate the degree of prejudice arising from the violation,

as well as the efficacy of available remedies that may prevent prejudice resulting from the violation. *Cornfeldt v. Tongen*, 262 N.W.2d 684, 697 (Minn. 1977).

Minn. R. Civ. P. 37.02(b) authorizes a court to impose sanctions for failure to comply with any discovery order, including an order made in accordance with rule 35 or rule 31.07. Before the court may impose a rule 37.02(b) sanction, a party must have failed to provide or permit discovery in violation of a court order. *Id*. The district court should provide a clear warning before automatically imposing severe sanctions such as dismissal of an action. *See Sudheimer v. Sudheimer*, 372 N.W.2d 792, 795 (Minn. App. 1985) (stating that the existence of a clear warning that a severe sanction will be imposed has been a significant factor on appeal in determining whether a sanction was appropriate).

On January 7, 2008, the district court ordered that the GAL has the authority to direct both parties "to undergo psychological, chemical dependency or any other evaluations or assessments deemed appropriate" by the GAL. On March 14, 2008, the GAL recommended that appellant participate in a chemical-dependency and a psychosexual evaluation. The GAL provided two options of evaluators for each evaluation, and also invited both parties to choose their own neutral evaluators for their respective evaluations. The GAL approved respondent's chosen evaluator, testifying that she had trained with this particular doctor, was familiar with her as a psychologist and custody evaluator, and had a high opinion of her. However, the GAL objected to appellant's proposed evaluator for his psychosexual evaluation, and instead proposed additional evaluators. The GAL explained in her testimony that the evaluator proposed

by appellant submitted an interim report that rather than focusing on an actual evaluation of appellant instead unjustifiably focused on collecting information about respondent and the parties' child. Although the GAL recommended several more neutral evaluators, appellant never submitted to a psychosexual evaluation. The GAL reasonably rejected appellant's chosen evaluator as inappropriate and unhelpful.

On May 21, 2008, the district court ordered appellant to complete evaluations, and warned appellant that it "may make a negative inference regarding [appellant]'s failure to comply with previously ordered chemical dependency and psychosexual evaluations." On June 2, 2008, the district court again ordered appellant to submit to the court-ordered evaluations, indicating that the evaluators must be professionals approved by the GAL. On July 25, 2008, the district court again addressed appellant's failure to comply with the court-ordered evaluations, imposing two rebuttable presumptions that appellant (1) "has been using illegal drugs or has been under the influence of illegal drugs when the child was in his care" and (2) "has had sexual contact with the minor child." As of the last day of trial, November 25, 2008, appellant had not submitted to either evaluation.

The record supports the GAL's stated reasons for not approving appellant's doctor as an evaluator. The district court did not abuse its discretion in overruling appellant's objection to the psychosexual evaluator chosen by the GAL. The district court had clearly ordered appellant to submit to evaluations on numerous occasions throughout the trial. Appellant blatantly chose to ignore the court's clear orders and to dictate the proceedings as he chose. That choice, a completely inappropriate one, subjected him to sanctions. The court did not abuse its discretion in imposing sanctions.

Exclusion of expert witnesses

The district court has discretion to determine whether to exclude expert witness testimony, and its decision may not be reversed unless there is a clear abuse of discretion. *Dunshee v. Douglas*, 255 N.W.2d 42, 47 (Minn. 1977). Procedural rulings are also within the district court's discretion. *Braith v. Fischer*, 632 N.W.2d 716, 721 (Minn. App. 2001), *review denied* (Minn. Oct. 24, 2001).

Through interrogatories, a party may inquire of the other party as to the identity of its expert witnesses, "to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion." Minn. R. Civ. P. 26.02(e)(1)(A). "A party thus has an absolute right to a summary of the grounds for each opinion held by an opponent's expert." *Dennie v. Metro. Med. Ctr.*, 387 N.W.2d 401, 406 (Minn. 1986). Inadequate answers to interrogatories may warrant sanctions by the trial court. *Id.* Although district courts are cautioned not to exclude expert testimony for an inadvertent failure to disclose that testimony during discovery, exclusion of an expert is justified when prejudice would result. *Id*. at 405 (quotation omitted). The serious sanction of suppression of expert testimony should be imposed only in the most compelling circumstances and then only after the following factors are carefully considered:

> (1) the extent of preparation required by an opposing party in preparing for cross-examination or rebuttal of expert witnesses;
> (2) when the expert agreed to testify;
> (3) when the party calling the expert notified the opposing party of the expert's availability;

> (4) when the attorney calling the expert assumed control of the case;
> (5) whether a party intentionally and willfully failed to disclose the existence of a trial expert; and
> (6) whether the opposing party sought a continuance or other remedy.

Id. at 406.

We hold that appellant's refusal to comply with discovery regarding the proposed opinions of his experts justified their exclusion.

On August 6, 2008, the district court excluded the testimony of the first of appellant's expert doctors because appellant had failed to submit to the court-ordered chemical-dependency and psychosexual evaluations. Requiring the GAL and respondent to prepare for cross-examination of the expert without the benefit of those examinations would have resulted in an unfairly prejudicial burden. There was also little to no disclosure as to the substance of the facts and opinions to which the expert would testify. In his June 9, 2008 disclosure, appellant indicated only that the subject matter of testimony would be the "[a]llegations of child abuse by [respondent];" the substance "[w]ill be provided at or before trial;" and it is "[h]is experience, education, training, interviews and documents" that qualify him. These answers are absolutely inadequate and invite a trial of ambush and surprise. By the court's July 25, 2008 order, appellant had served incomplete answers to interrogatories regarding the expert doctor, and still had not scheduled the court-ordered examinations. The court properly imposed the rebuttable evidentiary presumptions for appellant's refusal to follow the rules.

On September 4, 2008, when the district court excluded the testimony of the appellant's second expert, there was still no indication that appellant intended to comply with the court-ordered chemical evaluations. There was also little disclosure in the second expert's "Interim Rough Draft Report" as to the substance of the facts and opinions to which he would testify, aside from what steps the expert had taken and those he would like to take to complete his report.

Furthermore, appellant's counsel represented appellant as early as October 2007, which was about eight months prior to the district court's first order compelling discovery responses on June 2, 2008, and over a year prior to the November 2008 trial. Given the early and sustained representation by counsel, appellant had more than sufficient time to disclose the substance of his experts' opinions.

Although under *Dennie* district courts should prefer alternative measures to excluding an expert witness, reasonable alternative remedies were not available in this matter. The district court repeatedly ordered appellant, and imposed other sanctions to encourage appellant, to comply with discovery, but to no avail. Appellant never made a substantial, substantive, required disclosure as to either expert's testimony. The district court's sanction was fully warranted and not an abuse of discretion.

Child's Therapy Records

Appellant sought to discover the child's therapy records. The district court has wide discretion in determining whether the discovery rules are being used "in bad faith to unreasonably annoy, embarrass, oppress, or injure a party or [witness]." *Thermorama, Inc. v. Shiller*, 271 Minn. 79, 83, 135 N.W.2d 43, 46 (1965). It also has wide discretion

in protecting an individual from such abuses. *Id*. To protect the child from injury, the district court limited appellant's discovery of the child's records until such time as his psychosexual evaluation was completed and reviewed by the court. Because the psychosexual evaluation was never completed, the court did not lift its order. On this record, the court's protective order was supported by the court's duty to protect the child and was not an abuse of discretion. We note that the court did not absolutely deny access to the records but conditioned access on compliance with a proper court order.

Hearsay

Appellant also argues that the district court erred by "admitting [four] types of hearsay evidence over appellant's objections." The district court overruled appellant's objections and allowed the evidence under rule 807 of the Minnesota Rules of Evidence.

"The admission of evidence rests within the broad discretion of the [district] court and its ruling will not be disturbed unless it is based on an erroneous view of the law or constitutes an abuse of discretion." *Kroning v. State Farm Auto. Ins. Co.*, 567 N.W.2d 42, 45-46 (Minn. 1997) (quotation omitted). Unless there is some indication that the district court acted "arbitrarily, capriciously, or contrary to legal usage," this court is bound by the district court's determination. *Id*. at 46. "Entitlement to a new trial on the grounds of improper evidentiary rulings rests upon the complaining party's ability to demonstrate prejudicial error." *Id.* (quotation omitted).

Rule 807 allows into evidence a hearsay statement "having equivalent circumstantial guarantees of trustworthiness," as the specified hearsay exceptions in rules 803 and 804, if the court finds that

> (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

Minn. R. Evid. 807.

Appellant's first hearsay argument is that the district court erred by admitting respondent's testimony regarding statements the child made to her while taking a bath. Appellant contends that respondent did not provide proper timely notice of her intent to use these hearsay statements. Rule 807 requires respondent, "sufficiently in advance of the trial or hearing, to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name, address and present whereabouts of the declarant." Minn. R. Evid. 807. Respondent provided the requisite notice to appellant on October 28, which was 21 days prior to the November 18, 2008 start date of the proceeding. Appellant argues that respondent should have provided him with notice at the October 24, 2008 hearing. Respondent's notice was sufficient, and even if it was not, nowhere does appellant articulate what he would have done differently in terms of his preparation for the proceeding had he had notice merely four days earlier. *See State v. Riddley*, 776 N.W.2d 419, 427-28 (Minn. 2009) (stating that defendant's failure to articulate to the district court or appellate court how lack of formal notice to use *Spreigl* evidence adversely affected his trial preparation or what he might have done differently indicates a failure to demonstrate how the lack of notice prejudiced him).

To be admissible under the residual hearsay exception, the out-of-court statement must bear sufficient guarantees of trustworthiness. Minn. R. Evid. 807. Minn. Stat. § 595.02, subd. 3 (2008), is a hearsay exception specifically applicable to allegations of sexual abuse of children. Under caselaw, the factors relevant to determining trustworthiness for both the statutory and the rule 807 exceptions are similar. *See State v. Edwards*, 485 N.W.2d 911, 915-17 (Minn. 1992) (affirming admission of hearsay testimony of interviewer of child-abuse victim). In determining the reliability and trustworthiness, and thus the admissibility, of out-of-court statements in cases of alleged child abuse, an examination of the "totality of the circumstances surrounding the actual making of the statement[s]" is warranted. *Id.* at 915.

> These circumstances include, but are not limited to, [1] whether the statements were spontaneous, [2] whether the person talking with the child had a preconceived idea of what the child should say, [3] whether the statements were in response to leading or suggestive questions, [4] whether the child had any apparent motive to fabricate, . . . [5] whether the statements are the type of statements one would expect a child of that age to fabricate[,] . . . [6] the mental state of the child at the time the statements were made, . . . [7] the consistent repetition of the child's statements during the same interview or conversation, . . . [and] [8] whether the child had an apparent motive to speak truthfully.

Id. at 915-16 (quotations omitted).

The district court found that six of these considerations weighed in favor of admissibility: the child's statements were spontaneous; respondent lacked a preconceived idea of what the child would say; respondent did not ask leading questions; the child used age-appropriate language, and this is not a statement one would expect a four-year-old

child to fabricate; the child was upset and crying; and respondent testified credibly. We previously evaluated the same testimony of the respondent in appellant's appeal of the OFP using the factors outlined in *Edwards*, and found that the majority of the factors weigh in favor of admitting the evidence. *See Ball v. Prow*, No. A08-0528, 2009 WL 511343, at *2-7 (Minn. App. Mar. 3, 2009). The district court did not abuse its discretion in allowing the child's statements into evidence in this proceeding.

Appellant's second hearsay argument is that the district court abused its discretion in admitting respondent's testimony regarding statements made by a child-protective-services worker during the course of the investigation by county social services. Appellant asked respondent about her "understanding" of the result of an investigation by county social services. When respondent began to relate what the child-protective-services worker said, appellant objected on the ground of hearsay. Although the court ultimately overruled the objection on hearsay grounds, it did sustain appellant's objection on the grounds that it was not responsive. Thus, no hearsay statement became evidence in the trial at this point. Furthermore, the child-protective-services worker did testify in person, and counsel had an opportunity to cross-examine her about her investigation and report.

The last two hearsay arguments made by appellant involve the child's play therapist's testimony regarding statements made by the child during a therapy session, and testimony describing drawings alleged to have been made by the child depicting abuse. The district court found that the statements made to the play therapist by the child were "spontaneous, credible, used the same age-appropriate language and were consistent

with what the child had reported his mother and to MCRC, and also consistent with the information gathered" from a licensed psychologist by the GAL. The court determined that the play therapist did not have any preconceived ideas of what the child would say. The record contains sufficient evidence to support these determinations.

Appellant's objections as to foundation and best evidence went to the therapist's records; in particular, the child's drawings. The best evidence rule does not apply here because the play therapist did not describe the content of the drawings at all; rather, she testified to the substance of her conversation with the child while he was drawing:

> And he said, I want to color the bad touch page. So he colored a picture that *he said* showed his dad peeing in his mouth. And then he went on to the good touch page and he drew another picture and then *he said*, oh I -- I didn't draw a good touch, this is where my dad bited me on the finger.

(Emphasis added.) The best-evidence rule is therefore not applicable to the play therapist's testimony, which was admissible by virtue of her firsthand knowledge of the conversation. *See* Minn. R. Evid. 1002 (indicating that to prove "the content" of a writing, the original is required); *see also* Minn. R. Evid. 602 (requiring personal knowledge).

The district court did not abuse its discretion in admitting the child's statements to the play therapist.

Cross-examination of the child-protective-services worker

Appellant argues that the district court unduly limited his cross-examination of a child-protective-services worker. We disagree. The district court is responsible for case management and has great discretion to determine the procedural calendar of a case.

McIntosh v. Davis, 441 N.W.2d 115, 119 (Minn. 1989). Considering judicial time constraints, a district court must exercise control over the length of trials. Minn. R. Evid. 611. A district court may place limits on evidence to avoid "undue delay, waste of time, or needless presentation of cumulative evidence." Minn. R. Evid. 403.

Here, the child-protective-services worker appeared for testimony on two days of trial. From the outset of the proceeding, both parties agreed to time parameters to present their respective cases; in addition, the child-protective-services worker indicated that she was only available to testify during a limited time frame. Both parties agreed to abide by her time constraints. Direct examination lasted over forty-five minutes. Cross-examination took nearly an hour.

Appellant asserted at trial that he did not have sufficient time to cross-examine the child-protective-services worker. The district court provided appellant with clear direction that, to bring her back to court for additional testimony, appellant would need to serve her with an additional, valid subpoena after she left the courtroom. Appellant attempted to serve the child-protective-services worker with a subpoena before she left the witness stand. and did so without an offer of payment as required by Minn. R. Civ. P. 45.02(d). Deputies were required for her safe exit from the courtroom. The court did not deny appellant the opportunity for additional cross-examination, but simply ruled that the witness could be compelled to testify further only through subpoena.

Given appellant's failure to follow the procedures for procuring additional testimony or records of a non-party witness and the district court's responsibility for case management, the district court did not abuse its discretion.

II.

Appellant argues that the district court abused its discretion in modifying appellant's child-support payments.

Appellant's first claim regarding this issue is that the district court erred by making November 26, 2007 the effective date for the modification of appellant's child-support obligation. He states no further arguments and cites no authority supporting this assertion. The district court enjoys broad discretion in ordering modifications to child support orders. *Putz v. Putz*, 645 N.W.2d 343, 347 (Minn. 2002). Modifications of child support may be made retroactive from the date of service of the notice of the motion to modify support. Minn. Stat. § 518A.39, subd. 2(e) (2006).

By notice and motion served November 26, 2007, respondent sought a change of custody and a corresponding modification of child support. The district court awarded sole custody to respondent. The district court directed the parties to the expedited child-support process to determine appellant's amount of support, retroactive from the date of service of the motion to modify support.

Because the district court, in accordance with Minn. Stat. § 518A.39, subd. 2(e), ordered modification of child support retroactive from the date of service of the notice of motion and motion, it did not abuse its discretion.

Appellant's second assertion is that the district court's June 29, 2009 order directing him to pay child support in the monthly sum of $1,401 is erroneous and is an abuse of discretion. We disagree.

Appellant argues that rule 361.02 of the Minnesota General Rules of Practice governing the expedited child support process applies here; thus, respondent should have made a request for appellant to disclose his financial information at any time after it was determined that child support would be referred for hearing under the expedited child-support process. This matter was commenced in district court. The expedited child-support process rules do not apply to matters commenced in district court. Minn. R. Gen. Pract. 351.01.

Minn. Stat. § 518A.28 (2006) applies to this matter and requires each party to file a financial affidavit, disclosing all sources of gross income, including relevant supporting documentation. Minn. Stat. § 518A.28(a). If a party fails to meet this burden "with the parent's initial pleading," the court "shall set income for that parent based on credible evidence." *Id.* (c). Income for a self-employed parent is defined as gross receipts, less costs of goods sold, and less expenses. Minn. Stat. § 518A.30 (2006). Relevant supporting documents include statements of receipts and expenses along with tax returns. Minn. Stat. § 518A.28(a).

In situations where an obligor does not have a "steady, determinable flow of income," courts have approved calculating income by averaging income over a longer period of time. *Swick v. Swick*, 467 N.W.2d 328, 332-33 (Minn. App. 1991), *review denied* (Minn. May 16, 1991). "[T]he opportunity for a self-employed person to support himself yet report a negligible net income is too well known to require exposition." *Ferguson v. Ferguson*, 357 N.W.2d 104, 108 (Minn. App. 1984). "A court can take into account the lifestyle of a sole business owner if the [income] figures offered do not

comport with the evidence of that person's lifestyle." *Johnson v. Fritz*, 406 N.W.2d 614, 616 (Minn. App. 1987). Moreover, where one party has made attempts to compel discovery, an unfavorable inference may be drawn against the party that failed to produce evidence in their exclusive possession. *Butt v. Schmidt*, 747 N.W.2d 566, 576 (Minn. 2008).

Respondent served a request for production of documents on March 26, 2008. After the June 2, 2008 order compelling discovery responses, appellant continued to object to requests for income information. After respondent's subsequent motion for sanctions and the district court's repeated orders on June 16, July 2, July 25, August 6 and September 4, 2008, appellant still failed to provide income information.

Appellant is the sole shareholder in Monty Prow Incorporated (d/b/a Patriot Auto). Without any supporting documents, appellant filed a financial affidavit with his initial pleadings, reporting a gross monthly income of $2,091. The district court found this figure not credible.

Appellant is significantly involved in the financial circumstances of his business. He testified to signing the business tax return, yet asserted that he did not know the gross receipts of his business or the value of this inventory. Appellant did not provide documentation of receipts and expenses, and failed to provide any business tax returns. Appellant testified to having bare monthly living expenses of $2,279.95 (mortgage, health insurance, food, and child support), which exceeds his claimed monthly income. Appellant testified that over the past five years he had reported gross income of over

$100,000. He purchases automobiles for resale, resulting in gross annual receipts of $175,000.

The district court took painstaking efforts to arrive at appellant's gross monthly income of $9,847. Considering appellant's testimony of gross annual earnings of over $100,000 for his business in the past five years, and the propriety of drawing a negative inference because of appellant's failure to produce financial discovery, the district court's finding is not clearly erroneous.

Appellant argues that the district court clearly erred in finding that respondent is not voluntarily unemployed. "Potential income" may be imputed if a parent is voluntarily unemployed. Minn. Stat. § 518A.32, subd. 1 (2006). But a parent is not voluntarily unemployed and potential income will not be imputed if the parent shows the unemployment "is temporary and will ultimately lead to an increase in income" or "represents a bona fide career change that outweighs the adverse effect of that parent's diminished income on the child." *Id.*, subd. 3.

Here, the record reveals that respondent previously earned $11-$12.50 an hour as a personal-care attendant and secretary. Respondent also worked as a waitress and bartender, earning minimum wage plus tips. Respondent is attending school to become a dental hygienist. Respondent testified that dental hygienists earn approximately $50,000 to $70,000 annually. Even if respondent attains the lowest earnings of $50,000, this well exceeds her previous highest earning level.

Given the disparity in the parties' earning capacities, respondent's low-level wages in the past and her ability to double her income through education, the district court did not clearly err in finding that she was not voluntarily unemployed.

Appellant further argues that the district court erred in determining, for purposes of calculating child support, that respondent's gross monthly income is $0.00 and appellant's is $9,846.66. Although respondent has held various jobs in the past, the record indicates that respondent has not worked since she started school full time in the fall of 2007. Appellant testified to his own lifestyle and expenses. Given these facts, as well as appellant's failure to comport with court-ordered discovery, the district court's findings of $9,846.66 as gross monthly income for appellant and $0.00 as gross monthly income for respondent are not clearly erroneous.

III.

On review of an award of need-based attorney fees, the standard of review is whether the district court abused its discretion. *Gully v. Gully*, 599 N.W.2d 814, 825 (Minn. 1999). Appellant does not challenge respondent's need for attorney fees, but rather argues that respondent's motion for attorney fees was untimely. We disagree.

Fees, costs and disbursements "may be awarded *at any point in the proceeding*." Minn. Stat. § 518.14, subd. 1(3) (2008) (emphasis added). An attorney seeking an award of fees in the amount of $1,000 or more must do so by motion accompanied by an attorney affidavit describing each item of work performed, the time spent on each item of work, and the hourly rate for the work performed. Minn. R. Gen. Pract. 119.01-02.

On June 18, 2008, respondent moved for attorney fees under Minn. Stat. § 518.14 (2008). This motion was accompanied by an attorney affidavit describing the items of work, time spent, and the attorney's hourly rate. The district court granted the motion on July 25, 2008, ordering $2,000 in attorney fees related to the underlying motion to compel and reserving the amount of fees and costs for the modification of custody hearing. On August 12, 2008, respondent moved for costs. This motion included a detailed list of costs incurred in preparation for trial. The district court granted this motion on September 4, 2008. In her opening statement at the hearing, respondent reminded the district court of the reserved issue of the amount of fees and costs, noting an affidavit would be submitted at the end of the proceedings detailing the amount of fees and costs sought. The parties agreed to submit their post-hearing briefs by December 12, 2008. On December 12, 2008, respondent provided a summary of the argument for fees and costs in her closing memorandum and submitted a summary affidavit detailing all fees and costs incurred throughout the proceedings and the amounts already paid by appellant. At the request of the district court, respondent later provided an itemized list of attorney time records, which was also provided to appellant. Respondent's motion for fees and costs was made while the proceeding was pending, and was therefore timely.

Appellant further argues that the fact that respondent's attorney sent a letter to appellant's attorney, which was addressed to the district court judge and contained an affidavit in support of attorney fees and costs, shows that respondent's attorney engaged in improper ex parte communications. Appellant also received communication from respondent's attorney, addressed to him, that did not contain the affidavit in support of

attorney fees and costs. To make a claim of reversible error on appeal, appellant must demonstrate that there was an ex parte communication, the communication constituted error, and the error was prejudicial. *Koes v. Advanced Design, Inc.*, 636 N.W.2d 352, 363 (Minn. App. 2001), *review denied* (Minn. Feb. 19, 2002).

Even if the letter containing the affidavit in support of attorney fees and costs was an ex parte communication, it did not result in prejudice to appellant. The district court's order and respondent's posttrial affidavit demonstrate that the district court did not award the entirety of respondent's requested fees, accounting for amounts previously paid by appellant. The district court also reduced the requested fee award, citing *Hensley v. Eckerhart*, 461 U.S. 424, 1103 S. Ct. 1933 (1983), as authority for reducing duplicative hours and inadequate descriptions.

The district court did not abuse its discretion in awarding attorney fees and costs to respondent.

We conclude by noting that we have discussed far more in this opinion than is warranted by appellant's unmeritorious arguments. Throughout the proceedings, the district court made every effort to be fair to the parties, and succeeded in being so despite appellant's continual efforts to obstruct and thwart the proper resolution of the case. Any notion that appellant did not receive a fair hearing is misguided, unsupportable in fact, and self-inflicted.

Affirmed.