STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1560

In re the Marriage of:
Rici Lynn Smentek, petitioner,
Respondent,

vs.

Timothy Robert Smentek,
Appellant.

Filed August 6, 2012
Reversed and remanded
Peterson, Judge

Isanti County District Court
File No. 30-FA-06-101

David John Sjoberg, Sjoberg & Associates, P.A., Ham Lake, Minnesota (for respondent)

Erin Kay Turner, Johnson & Turner, Forest Lake, Minnesota (for appellant)

Considered and decided by Stoneburner, Presiding Judge; Peterson, Judge; and Hudson, Judge.

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

PETERSON, Judge

In this child-support dispute, appellant-father argues that (1) the district court's modification of child support fails to give adequate weight to the stipulated child-support obligation in the dissolution judgment; and (2) the district court overstated father's

income for support purposes when it included in his income amounts earned from employment in excess of a 40-hour work week. We reverse and remand.

FACTS

The marriage of appellant-father Timothy Robert Smentek and respondent-mother Rici Lynn Smentek was dissolved in 2007 by a stipulated judgment. The parties were awarded joint legal and joint physical custody of their two children. The parenting-time schedule provided for the children to spend eight days and nights with mother and six days and nights with father every two weeks. Both parties were awarded equal vacation and holiday time with the children.

At the time of dissolution, father's gross monthly income was $3,361.67, and mother's was $4,508.41. Father was ordered to pay $150 per month for child support. The dissolution judgment states:

> The child support awarded is based upon the negotiations of the parties, taking into account the incomes and needs of the parties and minor children. The parties acknowledge that the guideline child support would have likely resulted in very dissimilar child support awards in applying the pre-2007 and post-2007 child support guidelines and that the child support awarded herein falls in between.

Father was also ordered to pay 46.2% of $975 per month in child-care costs and to provide medical insurance for the children.

The dissolution judgment contains the following provision on child-support modification:

> Prior to the parties' [oldest] minor child . . . entering the first grade, the parties shall renegotiate the parenting time schedule in line with the best interests of the children. In the

> event that an agreement cannot be reached between the parents, the Court will take a De Novo approach to determining a new parenting plan schedule. The Court shall take a De Novo approach to child support and shall recalculate child support pursuant to the then existing child support guidelines. The parties agree that the child support and child care costs obligations herein shall not be modified in the De Novo review process unless such process results in a significant change in the parenting time schedule. A significant change shall be defined as no more than a 1% decrease or any amount increase in [father's] parenting time schedule as outlined in paragraph 4 [of the dissolution judgment].

In August 2009, mother moved to modify parenting time and child support. In an interim order filed August 31, 2009, the district court temporarily reduced father's parenting time to every other weekend from Friday evening until Monday morning and every Wednesday and every other Thursday evening and reserved the issue of child support. The same schedule was set forth in a second temporary interim order filed July 13, 2010, which also granted father six months from April 28, 2010, to move within 25 miles of the children's school. Father moved within 14 miles of the children's school and, by order filed December 28, 2010, the district court reinstated the original parenting-time schedule agreed to by the parties. The issue of child support was again reserved.

In 2011, mother moved to increase father's child-support obligation to $1,150 per month retroactive to the date of her August 2009 motion. The district court found that mother's gross monthly income was $5,236.40 and that father's was $5,486.34. The district court ordered father to pay $1,150 per month for child support, which included child-care costs and medical insurance, effective April 1, 2011. The district court granted father a 43% parenting-time credit. Father appeals.

D E C I S I O N

"The district court enjoys broad discretion in ordering modifications to child support orders." *Gully v. Gully*, 599 N.W.2d 814, 820 (Minn. 1999). "A district court order regarding child support will be reversed only where a district court abused its discretion by resolving the matter in a manner that is against logic and the facts on the record. Misapplying the law is an abuse of discretion." *Bauerly v. Bauerly*, 765 N.W.2d 108, 110 (Minn. App. 2009) (citation omitted). We review questions of law de novo and findings of fact for clear error. *Ayers v. Ayers*, 508 N.W.2d 515, 518 (Minn. 1993). Determining the proper statutory standard is a question of law. *Id.*

When considering a request to modify child support, "the existence of a stipulation does not bar later consideration of whether a change in circumstances warrants modification." *O'Donnell v. O'Donnell*, 678 N.W.2d 471, 475 (Minn. App. 2004) (quotation omitted). Instead, the stipulation provides the baseline from which to identify whether there has been a substantial change in circumstances. *See Hecker v. Hecker*, 568 N.W.2d 705, 709 (Minn. 1997) (noting this principle in the spousal-maintenance context). A stipulation is simply one factor to be considered, as child support "relates to nonbargainable interests of children." *O'Donnell*, 678 N.W.2d at 475 (quotation omitted); *see also Simmons v. Simmons*, 486 N.W.2d 788, 791-92 (Minn. App. 1992) (noting that the welfare of children takes precedence over any stipulated provision in a dissolution judgment).

The terms of a child-support order may be modified upon a showing of a substantial change in circumstances that makes the terms of the previous support order

unreasonable and unfair. Minn. Stat. § 518A.39, subd. 2(a) (2010). The moving party bears the burden of proof in a child-support-modification proceeding. *Bormann v. Bormann*, 644 N.W.2d 478, 481 (Minn. App. 2002). If applying the child-support guidelines to the parties' current circumstances results in a guideline child-support obligation at least 20% and $75 different from the existing child-support obligation, it is presumed that there has been a substantial change in circumstances, and there is a rebuttable presumption that the existing child-support obligation is unreasonable and unfair. Minn. Stat. § 518A.39, subd. 2(b)(1) (2010); *see also O'Donnell*, 678 N.W.2d at 477 (addressing application of statutory presumptions to stipulated child-support obligation).

When deciding a motion to modify child support,

> the district court [must] specifically address whether there has been a substantial change in [circumstances] and, if so, whether that change rendered [the] existing support obligation unreasonable and unfair. In doing so, the district court shall make findings adequate to explain its ruling and adequate to allow appellate review. The requirement that district courts make particularized findings on child-support issues ensures effective appellate review and offers children and both parents the benefits of a careful, complete judicial analysis of support obligations.

Bormann, 644 N.W.2d at 482 (quotation and citations omitted).

The district court did not make the findings required to support a child-support modification. Rather, the district court applied the de novo review provision set forth in the dissolution judgment. But the de novo review provision states:

> The parties agree that the child support and child care costs obligations herein shall not be modified in the De Novo

> review process unless such process results in a significant change in the parenting time schedule. A significant change shall be defined as no more than a 1% decrease or any amount increase in [father's] parenting time schedule as outlined in paragraph 4 [of the dissolution judgment].

Mother argues that applying the de novo review provision is appropriate because father's parenting time was temporarily reduced during a 16-month period when he resided more than 25 miles from the children's school. Although interim orders temporarily decreased father's parenting time by more than one percent, the issue of child support was reserved until a permanent parenting-time schedule was established. The August 31, 2009 order states:

> 11. The reduction in [father's] parenting time is on a temporary basis until [the parenting-time expeditor] makes further recommendations for the interim, until [father] moves and a new parenting time is put in place.
>
> 12. Child Support shall be **RESERVED** until such time as parenting time has been established and the parties submit income information prior to the evidentiary hearing. The Court shall determine child support at the time of the evidentiary hearing.

The order modifying parenting time states:

> 16. The Court finds the parenting schedule of the parties was changed by the Court due to [father's] move to Hastings and the Court's concern for the amount of windshield time the minor children would experience during [father's] parenting time. The Court's intent was not to make any changes in parenting time that would affect child support during the time [father] resided in Hastings and was making efforts to relocate to a closer location. It was the Court's intent that child support would not be changed until it was finally determined where [father] was going to live and the recommendations of the Guardian Ad Litem regarding

> permanent parenting time once [father] relocated within the 25 mile radius determined by the Court.
>
> 17. The Court finds [father] did make great efforts to relocate as soon as this became a big issue but various disagreements and housing issues delayed his ability to relocate his family from Hastings.
>
> 18. The Court finds [father] was finally able to make the relocation occur so that now the remaining issue is a new child support calculation based upon the Guardian Ad Litem recommended and Court ordered parenting time as reserved by the Court in paragraph 12 of the Court's Order dated August 31, 2009.
>
> 19. The Court finds a parenting schedule was issued in the Court's Order dated December 28, 2010.
>
> 20. The Court finds it is appropriate to increase [father's] child support obligation based upon the current parenting schedule and the current gross income of both parents.
>
> 21. The Court finds it is fair and equitable to start [father's] new child support obligation as of April 1, 2011.

Because the district court reserved the issue of child support until father could relocate to within 25 miles of the children's school and because the original parenting-time schedule was reinstated before the child-support modification became effective, the requirements for setting child support de novo under paragraph eight of the dissolution judgment were not met, and the district court erred in modifying child support without making the findings required to support a child-support modification. We, therefore, reverse the modification of child support and remand for additional findings.

Father argues that the district court erred in including overtime income in his gross income. The standard for determining whether compensation received by a party for

employment in excess of a 40-hour work week is included in gross income for child-support purposes is set forth in Minn. Stat. § 518A.29(b) (2010). On remand, we also instruct the district court to make findings on whether the statutory factors have been met.

Reversed and remanded.