STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1240

In re the Custody of M. M. L.

Nathan James Sands, petitioner,
Appellant,

vs.

Sue Mae Lovick,
Respondent,

Dakota County,
Respondent.

Filed April 16, 2018
Reversed and remanded
Schellhas, Judge

Dakota County District Court
File No. 19HA-FA-08-907

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Considered and decided by Schellhas, Presiding Judge; Halbrooks, Judge; and Jesson, Judge.

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

SCHELLHAS, Judge

Appellant-father challenges the district court's imputation of income and award of conduct-based attorney fees to respondent-mother. We reverse and remand the district court's imputation of income and reverse the award of conduct-based attorney fees.

FACTS

Appellant-father Nathan Sands and respondent-mother Sue Mae Lovick are the parents of one child, now 17 years old. In 2004, the district court granted Sands and Lovick joint legal custody of M.M.L. and Lovick sole physical custody, and ordered Sands to pay child support to Lovick. In December 2008, respondent-Dakota County (county) intervened to assist Lovick in enforcing Sands's child-support obligations.

In 2014, Lovick moved the district court to find Sands in civil contempt. Sands and Lovick reached an agreement, as follows in pertinent part:

> [Lovick's] request for attorney fees is reserved. If it is later determined that [Sands's] recent employment was started and then terminated simply to avoid possible consequences of [Lovick's] contempt motion, the court can consider an award. Consideration for [Lovick] withdrawing her contempt motion is the assurance of regular, monthly support payment through wage withholding through [Sands's] employment.

Sands obtained hourly employment from June 2014 until January 2015, when he was involuntarily terminated. Following Sands's employment termination, Lovick renewed her contempt motion for Sands's failure to pay child support and moved the court for need- and conduct-based attorney fees. In March 2015, Sands moved the district court to modify his child-support obligation and applied for unemployment benefits. Due to cost-

of-living adjustments (COLA) from 2004 to May 2015, Sands's child-support obligation increased to $685.

On May 15, 2015, the district court heard Lovick's contempt motion and issued a contempt order and an amended contempt order on July 9, 2015, to correct "substantive and clerical errors." The court ordered Sands confined to jail for a period not to exceed 90 days, but stayed the confinement for two years subject to the following purge conditions: Sands was required, based on his agreement, to pay 100% of his unemployment benefits to Lovick and to make a good-faith effort to obtain employment. The court also reserved Lovick's motion for attorney fees.

On August 28, 2015, the district court acknowledged Sands's compliance with the purge conditions in the contempt order and heard his motion to modify his child-support obligation. On September 4, due to the impending expiration of Sands's unemployment benefits, the court issued "new conditions on Mr. Sands's stayed sentence of contempt from the amended order dated 7/9/2015," and reduced Sands's child-support obligation to $528 per month, including payment on arrearages. The court also granted Lovick's request for attorney fees.

Sands appealed the September 4, 2015 order. This court reversed the child-support and attorney-fee awards and remanded to the district court for further findings regarding Sands's income, the attorney-fee award, and for explanation about the statutory authority for the court's order. *In re the Custody of M.M.L.*, No. A15-1807, 2016 WL 7438705, at *5 (Minn. App. Dec. 27, 2016) (*M.M.L. I*). This court stated that the district court "has discretion to . . . reopen the record" to make sufficient findings. *Id*. On remand, the district

court conducted a non-evidentiary hearing and issued an order on June 8, 2017, finding that the record supported its September 4, 2015 order, and noting that it had imputed income to Sands in reliance on Minn. Stat. § 518A.32, subd. 2(1) (2016), and Sands's "probable earnings level based on employment potential, recent work history, and occupational qualifications in light of prevailing job opportunities." The court also noted that it had awarded conduct-based attorney fees to Lovick under Minn. Stat. § 518.14, subd. 1 (2016), based on Sands "unreasonably contributing to the length or expense of the proceeding."

Sands now appeals the June 8, 2017 order.

D E C I S I O N

I. Sands's imputed income

Sands argues that the district court erred in its imputation of income to him because the court's findings of fact lack support in the record. Sands also argues that the district court erred in its reliance on Minn. Stat. § 518A.32, subd. 2(1), instead of subdivision 2(3), which calculates imputed income on a multiplier of either the state or national minimum wage.

An appellate court will reverse a district court's order regarding child support only if the district court abused its broad discretion by reaching the question in a manner "that is against logic and the facts on record." *Butt v. Schmidt*, 747 N.W.2d 566, 574 (Minn. 2008) (quotation omitted). "A [district] court's determination of income must be based in fact and will stand unless clearly erroneous." *Newstrand v. Arend*, 869 N.W.2d 681, 685 (Minn. App. 2015) (quotation omitted), *review denied* (Minn. Dec. 15, 2015). A district

court's finding is clearly erroneous if this court has a "definite and firm conviction that a mistake has been made." *Id.* (quotation omitted).

A district court must make written findings in every case in which it computes child-support obligations that include, in part, a parent's gross income. Minn. Stat. § 518A.37 (2016). A district court must calculate child-support obligations based on potential income if it finds that the parent is "voluntarily unemployed, underemployed, or employed on a less than full-time basis, or [if] there is no direct evidence of any income." Minn. Stat. § 518A.32, subd. 1 (2016). A district court that lacks sufficient income information for a party presumes that a "party who has not provided the court with sufficient income information is voluntarily unemployed or underemployed." *Butt*, 747 N.W.2d at 576.

A district court must calculate potential income according to one of three methods:

> (1) the parent's probable earnings level based on employment potential, recent work history, and occupational qualifications in light of prevailing job opportunities and earnings levels in the community;
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> (2) if a parent is receiving unemployment compensation or workers' compensation, that parent's income may be calculated using the actual amount of the unemployment compensation or workers' compensation benefit received; or
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> (3) the amount of income a parent could earn working 30 hours per week at 100 percent of the current federal or state minimum wage, whichever is higher.[1]

[1] The legislature amended Minn. Stat. § 518A.32, subd. 2(3), effective March 1, 2016, to read "(3) the amount of income a parent could earn working *30 hours per week at 100* percent of the current federal or state minimum wage, whichever is higher." 2015 Minn. Laws ch. 71, art. I, § 70, at 905 (emphasis added).

Minn. Stat. § 518A.32, subd. 2 (2016). If a district court "lacks sufficient information about [a party's] income, work history, education, and reasons for being unemployed that may excuse [the party] from a finding that [he or] she is voluntarily unemployed under Minn. Stat. § 518.551, subd. 5b(d), the court should impute income to [the party] based on subdivision 5b(d) and (e)." *Butt*, 747 N.W.2d at 577.[2]

At Sands's child-support modification hearing on August 28, 2015, the county informed the district court that Sands's prior wage was $13 per hour based on a wage-match history. In its September 2015 order, the district court imputed income to Sands in the amount of "$20/hour in a 40-hour work week, resulting in monthly imputed income of $3,464." In remanding to the district court, this court stated that "the district court was within its discretion to calculate Sands's potential income" because it properly determined that he was "voluntarily unemployed." *M.M.L. I*, 2016 WL 7438705, at *3. But we also stated that the district court was "limited to calculating Sands's income potential based on his probable earnings or minimum wage because, at the time of the August [2015] review hearing, [Sands's] unemployment-compensation benefits were nearly exhausted." *Id*. We

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[2] In *Butt*, the supreme court analyzed the then applicable statute governing the imputation of income for child-support obligations. 747 N.W.2d at 574. This stated in pertinent part:

> (d) If the court finds that a parent is voluntarily unemployed or underemployed . . . support shall be calculated based on a determination of imputed income. . . .
>
> (e) If there is insufficient information to determine actual income or to impute income pursuant to paragraph (d), the court may calculate support based on full-time employment of 40 hours per week at 150 percent of the federal minimum wage or the Minnesota minimum wage, whichever is higher.

Minn. Stat. § 518.551, subd. 5b(d), (e) (2004). Eventually, the legislature included this language in Minn. Stat. § 518A.32. 2007 Minn. Laws ch. 118, § 3, at 775.

also stated that "the district court *likely erred* if its calculation was based on probable earnings because Sands's imputed income does not reflect his recent work history." *Id*. (emphasis added). At the time of the August 15, 2015 child-support-modification hearing, Sands's most recent gross income on record—for 2014—was $12,567.60, or $6.04 per hour ($12,567.60 ÷ 2080 hours = $6.04 per hour).

On remand, the district court cited Minn. Stat. § 518A.32, subd. 2(1), and imputed income to Sands based on its calculation of his "probable earnings level based on employment potential, recent work history, and occupational qualifications in light of prevailing job opportunities and earnings levels in the community." The district court also noted that Sands could secure employment at a higher wage than his most recent job based on the prevailing job market and his prior qualifications because he is "educated, able-bodied, and previously made significantly more money prior to his losing his [real-estate appraisal] license to work." The district court neither reopened the record nor made any additional findings of fact to support its calculation of $20 per hour as imputed income.

Sands argues that the record does not support the district court's imputation of income under Minn. Stat. § 518A.32, subd. 2(1), and that the court should have imputed income under Minn. Stat. § 518A.32, subd. 2(3), using a minimum-wage based calculation. In *Butt*, the supreme court stated that "if the [district] court cannot determine actual income or imputed income because it lacks sufficient information, [Minn. Stat. § 518A.32, subd. 2] directs the court to calculate income for purposes of child support based on [the] minimum wage," and the court remanded to the district court to determine whether the

record contained insufficient income information for the mother and, if so, to impute her income using a minimum-wage-based calculation. 747 N.W.2d at 576−77.

We agree with Sands that neither the district court's findings of fact nor the record evidence supports an imputation of income under Minn. Stat. § 518A.32, subd. 2(1). The record contains no evidence to support an imputation of income of $20 per hour. The court's statement that "a wage of $20 an hour at full-time is an attainable wage . . . a little bit above minimum wage, but perhaps not at [Sands's] prior wages," is not, on this record, sufficient to support the imputation of income at $20 per hour. We conclude that the district court abused its discretion by imputing Sands's income under Minn. Stat. § 518A.32, subd. 2(1), because the record does not contain sufficient information for the court to calculate imputed income under that section. Nor could the court calculate imputed income under subdivision 2(2) because Sands no longer receives unemployment benefits. We therefore reverse the district court's imputation of income and remand for imputation of income to Sands based on the minimum-wage calculation in Minn. Stat. § 518A.32, subd. 2(3).

Sands does not address which version of Minn. Stat. § 518A.32, subd. 2(3), is applicable to the calculation of his imputed income. We nevertheless address the issue in the interests of judicial economy. *See Ryan Contracting Co. v. O'Neill & Murphy, LLP*, 868 N.W.2d 473, 481 (Minn. App. 2015) (addressing issue in case "in the interests of judicial economy because it is likely to arise on remand"), *aff'd as modified*, 883 N.W.2d 236 (Minn. 2016); *see also* Minn. R. Civ. App. P. 103.04 ("The appellate courts may . . . take any other action as the interest of justice may require.").

On remand, for the period preceding March 1, 2016, the district court should calculate Sands's imputed income at 150% times the applicable minimum wage times 40 hours per week under Minn. Stat. § 518A.32 subd. 2(3) (2014). For the period from March 1, 2016, to the present, the district court should calculate Sands's imputed income at 100% times the applicable minimum wage times 30 hours per week under Minn. Stat. § 518A.32 subd. 2(3) (2016). *See Interstate Power Co., Inc. v. Nobles Cty. Bd. of Comm'rs*, 617 N.W.2d 566, 575 (Minn. 2000) (stating that "appellate courts apply the law as it exists at the time they rule on a case," but that "an exception to this rule exists when rights affected by the amended law were vested before the change in the law").

II. Conduct-based attorney fees

Sands also argues that the district court abused its discretion by awarding Lovick conduct-based attorney fees because the court did not make adequate factual findings. We agree.

District courts may require a party who "unreasonably contributes to the length or expense of the proceeding" to pay the other party's attorney fees. Minn. Stat. § 518.14, subd. 1 (2016). "[C]onduct-based attorney fees are to be based on the party's behavior occurring during the litigation process." *Baertsch v. Baertsch*, 886 N.W.2d 235, 238 (Minn. App. 2016). The party asking for fees bears the burden of establishing that the other party's conduct unreasonably contributed to the length or expense of the proceeding. *Geske v. Marcolina*, 624 N.W.2d 813, 818 (Minn. App. 2001). The district court must make findings that explain the basis for an award of conduct-based fees. *Brodsky v. Brodsky*, 733 N.W.2d 471, 477 (Minn. App. 2007). Specifically, the district court must identify the conduct that

justifies the award and determine that it occurred during the litigation. *Geske*, 624 N.W.2d at 819.

Appellate courts review an award of conduct-based attorney fees for an abuse of discretion. *Gully v. Gully*, 599 N.W.2d 814, 825 (Minn. 1999). An appellate court "will not set aside a district court's factual findings underlying an award of attorney fees unless they are clearly erroneous." *County of Dakota v. Cameron*, 839 N.W.2d 700, 711 (Minn. 2013) (quotation omitted).

After Sands's first appeal of the district court's $9,952 attorney-fee award to Lovick, this court stated:

> The district court found that Sands's parents are paying his attorney fees, that Lovick's attorney fees have been generated due to Sands's failure to pay child support, and that Sands "has been voluntarily unemployed during at least part of that time period." But the record does not identify which statutory authority the district court relied on to award Lovick attorney fees.
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> . . . Moreover, it is unclear whether the district court awarded conduct-based attorney fees or attorney fees to enforce child-support payments because its justification awarding attorney fees was limited to finding that Lovick's attorney fees have been generated "in response to Lovick not getting child support." . . .
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> Because it is unclear under which statutory authority attorney fees were awarded, we remand the award of attorney fees to the district court so it can make the requisite findings.

In re M.M.L. I, 2016 WL 7438705, at *4−5 (citation omitted).

On remand, the district court stated that it awarded the attorney fees as conduct-based attorney fees under Minn. Stat. § 518.14, subd. 1, because Sands's "conduct and lack

of information provided, unnecessar[ily] contributed to the length and expense of the proceeding." The district court found that the parties were before the court due to Sands's failure to pay child support, his failure to find employment, and that he chose not to testify when the court gave him the opportunity to do so.

We conclude that the district court's factual findings are insufficient to support an award of conduct-based attorney fees. The findings do not explain how Sands's conduct contributed unreasonably to the length of the proceedings. *See Zentz v. Graber*, 760 N.W.2d 1, 7–8 (Minn. App. 2009) (concluding that mother unreasonably lengthened proceedings by filing an appeal to harass father, to prevent him from having contact with the child, and to gain advantage in future custody proceedings), *review denied* (Minn. Mar. 31, 2009). Because the record does not support an award of conduct-based attorney fees, we reverse the award of conduct-based attorney fees.

Reversed and remanded.