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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1549**

In re the Marriage of: Debra Ellen Lester, f/k/a Leadens, petitioner,
Appellant,

vs.

Dale Theodore Leadens,
Respondent.

**Filed July 8, 2008
Affirmed in part, reversed in part; motion denied
Schellhas, Judge**

Hennepin County District Court
File No. 27-FA-000297369

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

UNPUBLISHED OPINION

SCHELLHAS, Judge

Appellant challenges a district court order modifying her award of permanent spousal maintenance. She argues that the district court incorrectly found that respondent's income and appellant's expenses had decreased and, accordingly,

incorrectly found changed circumstances. Appellant also challenges the district court's denial of attorney fees. We agree that the district court erred in finding that respondent's income and appellant's expenses decreased and reverse the district court's modification of spousal maintenance. We affirm the district court's denial of attorney fees and deny appellant's motion for attorney fees on appeal.

FACTS

The 22-year marriage of appellant Debra Ellen Lester and respondent Dale Theodore Leadens was dissolved in December 2005. At that time, one of their children was a minor, age 17. The parties were awarded joint legal and joint physical custody of their minor child, no child support was awarded, and the issue of child support was reserved. The child emancipated roughly six months after the dissolution.

The parties settled most of their property division issues before trial, submitting the issue of spousal maintenance to the district court for trial. A judgment and decree was filed on November 28, 2005. The district court found that during the marriage, respondent owned and operated his own business and appellant left full-time employment after the parties' first of their two children was born. Thereafter, appellant took care of the children and worked at the family business. At the time of the dissolution, appellant's ability to work full-time was impaired by medical problems. The district court found that after retraining, appellant could work 20 hours per week and earn \$14 per hour but that she would need a position with a flexible schedule that limited her to sedentary forms of activity. The district court then found that appellant was not capable of self-support and needed spousal maintenance.

The district court considered the claimed monthly expenses of both parties and reduced them. The court analyzed, line-by-line, appellant's claimed monthly expenses, which included \$800 in expenses for the parties' minor child. Without delineating expenses for the minor child, the district court found that appellant's total reasonable monthly expenses were \$4,127.50. The district court reduced respondent's reasonable monthly expenses to \$3,709.

The district court determined respondent's annual income to be \$118,423, by setting an income figure for each source of respondent's income. In calculating respondent's spousal-maintenance obligation, however, the district court used a different income figure, \$128,719, by reference in its findings to Exhibit J-5. The difference in the income figures is the result of using different rental income figures: Exhibit J-5 states respondent's annual rental income as \$12,696, but the district court rejected that figure in Finding of Fact No. 29, and found respondent's annual rental income to be \$2,400. The variance in the district court's determination of respondent's annual income has been the source of dispute and controversy in the parties' post-decree proceedings. Respondent maintains that pursuant to the judgment and decree, the district court found his annual income was \$128,719; appellant maintains that it was \$118,423. In a post-decree order denying respondent's first motion to decrease spousal maintenance, the district court concluded that the marriage dissolution court had determined that respondent's annual income was \$118,423. In the second post-decree order, the district court concluded that pursuant to the judgment and decree, respondent's annual income at the time of the marriage dissolution was \$128,719.

In his second motion to reduce his spousal maintenance, respondent argued that both his income and appellant's monthly expenses had decreased and that circumstances had therefore substantially changed. Respondent submitted tax returns showing that his gross business receipts had declined from \$635,249 in 2005 to \$379,201 in 2006, and that he had made large reductions in his business overhead. Respondent emphasized that he paid roughly \$15,000 in annual health insurance premiums for the parties' two adult children, though he acknowledged that the marriage dissolution court had disallowed a deduction from his gross income for that expense. Respondent argued that his personal expenses had increased since the dissolution and that he had been incurring debt to pay spousal maintenance and other expenses. He argued that appellant's expenses had decreased because the parties' minor child had emancipated, emphasizing that at the time of the dissolution, appellant had claimed approximately \$800 in monthly expenses for the minor child. Respondent also argued that appellant's car insurance expenses had declined due to the sale of her vehicles, and that her monthly expenses had declined because her boyfriend had moved in with her.

Appellant responded by first pointing out that respondent's motion was his third motion to reduce spousal maintenance within 16 months of the entry of the decree, the first being respondent's post-trial motion for amending findings. Appellant argued that circumstances had not changed because, despite decreased gross business receipts, respondent's personal income from the business had actually increased. Appellant alleged that respondent paid for personal expenses through his business, that his payment of maintenance and expenses out of a line of credit was his choice, that he had cash

resources as evidenced by frequent withdrawals of cash made at ATMs located at two bars amounting to \$745 per month, and that appellant had taken on a new monthly expense of \$395 by purchasing a motorcycle. Appellant also argued that her expenses had not decreased and, in particular, had not decreased due to the emancipation of the parties' youngest child because the dissolution court had disallowed those expenses in its determination of appellant's reasonable monthly living expenses. Appellant denied living with her boyfriend, noting that she had previously provided the dissolution court with proof that her boyfriend paid rent for housing apart from hers and that she and her boyfriend had broken up. Appellant argued that her expenses had actually increased because she incurred debt to cover, among other expenses, the cost of her retraining, and because she used liquid resources to pay her attorney fees in connection with the dissolution and respondent's post-decree motions.

The district court granted respondent's motion to reduce spousal maintenance, based upon its finding that respondent's gross annual income had decreased from \$128,719, at the time of the dissolution, to \$119,386, and that appellant's expenses had decreased. The district court found that appellant's monthly expenses, at the time of the dissolution, included approximately \$800 related to the minor child, that the minor child had emancipated, and that appellant's "expenses should have decreased rather than increased due to the emancipation of the parties' son." The district court determined that respondent had a monthly budget shortfall of approximately \$796, and that appellant had a monthly budget surplus of approximately \$900. Accordingly, the district court reduced respondent's monthly spousal-maintenance obligation from \$4,250 to \$3,450, a monthly

decrease of \$800. The district court denied appellant's motion for attorney fees, finding that respondent's motion was made in good faith and appellant had sufficient assets and cash from which to pay her own fees. This appeal followed.

D E C I S I O N

I.

We review an order modifying maintenance for an abuse of discretion. *Youker v. Youker*, 661 N.W.2d 266, 269 (Minn. App. 2003), *review denied* (Minn. Aug. 5, 2003.) “In order for this court to find the trial court abused its discretion, there must have been a clearly erroneous conclusion that is against both logic and the facts on record.” *Cisek v. Cisek*, 409 N.W.2d 233, 235 (Minn. App. 1987) (citing *Rutten v. Rutten*, 347 N.W.2d 47, 50 (Minn. 1984), *review denied* (Minn. Sept. 18, 1987)).

“A party moving to modify an award of maintenance bears the burden of showing a substantial change of circumstances since the last time maintenance was modified, or if maintenance has not been modified, since it was originally set.” *Youker*, 661 N.W.2d at 269. “The moving party must then demonstrate that these changed circumstances render the original award unreasonable and unfair.” *Id.* Appellant challenges the modification by challenging the district court's findings of changed circumstances.

Changed circumstances that will justify modification include substantially increased or decreased income or expenses of either party. Minn. Stat. § 518A.39, subd. 2 (2006). A finding of changed circumstances is a factual finding. *Prange v. Prange*, 437 N.W.2d 69, 70 (Minn. App. 1989), *review denied* (Minn. May 12, 1989). Factual findings will not be set aside unless they are clearly erroneous. Minn. R. Civ. P.

52.01. Factual findings are clearly erroneous when they are “manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole.” *Tonka Tours, Inc. v. Chadima*, 372 N.W.2d 723, 726 (Minn. 1985).

The district court found that circumstances had changed because respondent’s income had decreased and appellant’s expenses had decreased. Appellant makes numerous arguments that the district court erred in its findings. Appellant first contends that respondent’s proper baseline level of annual income is \$118,423, not \$128,719, arguing that his present income of \$119,386 actually reflects an increase, not a decrease, from his income at the time of the dissolution. A comparison of respondent’s income at the time of his motion for spousal-maintenance modification with his income at the time of the decree is appropriate because, when modification is requested, the court compares the circumstances at the time of the motion to the baseline circumstances of the last award. *Maschoff v. Leiding*, 696 N.W.2d 834, 840 (Minn. App. 2005). In this case, the comparison is complicated by the ambiguity in the decree about respondent’s income and the resolution of the ambiguity by the district court in the resolution of respondent’s first modification motion.

Generally, although parties move for modification of maintenance whenever the circumstances change, “decisions on other issues litigated and determined in the course of deciding such motions should be given preclusive effect.” *Loo v. Loo*, 520 N.W.2d 740, 743 (Minn. 1994) (considering multiple motions to modify spousal maintenance and holding that while the doctrines requiring that judicial decisions have preclusive effect did not technically apply, the underlying principle that an adjudication on the merits of an

issue is conclusive and should not be relitigated, clearly applied). Under *Loo*, if the parties actually contested the issue of respondent's baseline level of income before the district court in the first modification motion, the district court's interpretation of respondent's baseline level of income should be given precedential effect. In fact, respondent's income ambiguity was submitted to the court in respondent's affidavit. Because the issue was submitted to the district court and resolved by the court in the first modification order, under *Loo*, the baseline level of income determined by the court in the first modification order should have been followed in the subsequent modification motion. A comparison of respondent's baseline level of income at the time of his first modification motion, \$118,423, with his income at the time of his second modification motion, \$119,386, reveals that respondent's income has not decreased, it has increased. Thus, the district court's finding of decreased income is clearly erroneous, and we reverse it.

Appellant argues that the district court also erred in its finding that her expenses had decreased. The district court stated that the decree found that appellant had reasonable monthly living expenses of \$4,125.40,¹ that “[o]f this amount, approximately \$800 was related to the parties’ minor son, Michael, who is now emancipated,” and that appellant’s expenses should have decreased upon the minor child’s emancipation. Appellant argues that this finding is incorrect because, as previously noted, the

¹ A minor error is apparent in this recitation; the decree actually states a slightly different figure, \$4,127.50. This error does not require a remand. *See Wibbens v. Wibbens*, 379 N.W.2d 225, 227 (Minn. App. 1985) (refusing to remand for de minimis technical error); *see also* Minn. R. Civ. P. 61 (requiring harmless error to be ignored).

dissolution court disallowed the expenses claimed for the minor child. But appellant's argument was not raised before the district court. "A reviewing court must generally consider 'only those issues that the record shows were presented and considered by the trial court in deciding the matter before it.'" *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (quoting *Thayer v. Am. Fin. Advisers, Inc.*, 322 N.W.2d 599, 604 (Minn. 1982)). Under *Thiele*, a party cannot raise a new issue on appeal, or raise the same general issue raised before the district court but address it with a new theory. *Id.* Although a party may refine the argument presented to the district court, *Jacobson v. \$55,900 in U.S. Currency*, 728 N.W.2d 510, 522-23 (Minn. 2007), appellant's argument on this issue is not a refinement; it is a new theory raised on appeal. Nevertheless, we conclude that it is appropriate to consider appellant's argument on this issue to determine if the district court's finding was in error and address the argument under Minn. R. Civ. App. P. 103.04, which allows this court to address any issue as justice requires.

The finding that appellant's expenses had decreased is erroneous and contrary to the record because the district court relied on appellant's expenses *claimed* at trial, not the expenses found by the dissolution court. The district court must compare appellant's expenses with her baseline level of expenses set forth in the decree. *Hecker v. Hecker*, 568 N.W.2d 705, 709 (Minn. 1997) (stating that stipulation that merged into judgment and decree provided baseline circumstances against which claims of substantial change were evaluated); *see also Yeager*, 405 N.W.2d at 522 (stating that comparison is between present circumstances and circumstances in which parties found themselves when the decree was rendered). The dissolution court made no finding that appellant had

reasonable expenses related to the minor child of \$800 per month, and actually disallowed most of appellant's claimed expenses related to the minor child. By using expenses appellant claimed at trial as the baseline for comparison, the district court erred in its finding that appellant's expenses had decreased. Additionally, the district court did not specifically find a decline in any particular reasonable expense in the line-by-line expense findings of the dissolution court but, rather, found more generally that appellant's expenses *should* have decreased and therefore reduced her total reasonable expenses by \$800. This approach by the district court is problematic because it fails to establish a clear baseline figure for future modification motions. "[T]he litigation of a later motion to modify [an] order becomes unnecessarily complicated" when the parties are forced to "litigate not only their circumstances at the time of the motion, but also their circumstances at the time of the order sought to be modified." *Maschoff*, 696 N.W.2d at 840. While stating only a total figure for reasonable expenses might sometimes be appropriate, in this case, the district court simply reduced the total figure of reasonable expenses when original expenses had been set forth by the dissolution court, line-by-line, in the decree. If the modified finding stands with no specific finding of reduction as to any particular expense found by the dissolution court, the new baseline for future comparison would be difficult to identify.

For all of the above-stated reasons, we reverse the district court's finding that appellant's monthly expenses had decreased as clearly erroneous.

Because the district court based its conclusion of changed circumstances on erroneous findings of changed income and expenses, we reverse the finding of changed

circumstances. Because changed circumstances are required to modify maintenance, we reverse the modification of appellant's spousal maintenance award.

II.

Appellant also challenges the district court's denial of her request for conduct-based attorney fees. "An award of attorney fees rests almost entirely within the discretion of the trial 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). A district court may award conduct-based attorney fees against a party who unreasonably contributes to the length or expense of the proceeding. Minn. Stat. § 518.14, subd. 1 (2006). Appellant argues she should have been awarded conduct-based attorney fees.

The district court found that there was no basis on which to award conduct-based fees, finding that respondent made his motion in good faith based on a decrease in business revenue and personal income. Appellant argues that conduct-based fees could be awarded without a finding of bad faith. While appellant is correct that the district court need not find bad faith to award attorney fees, *Geske v. Marcolina*, 624 N.W.2d 813, 818-19 (Minn. App. 2001), the court has the discretion to deny appellant's request. "The trial 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). In light of the district court's broad discretion, and its finding that respondent made his motion in

good faith, the court's decision to deny conduct-based fees was not an abuse of discretion. We affirm this ruling.

Appellant also seeks attorney fees on appeal. An appellate court may award conduct-based attorney fees if it concludes that a party has unreasonably contributed to the length or expense of proceedings. Minn. Stat. § 518.14, subd. 1 (2006). An appellate court may award need-based fees if it concludes the party seeking fees lacks the ability to pay fees, that the opposing party has the ability to pay, and that an award is necessary to permit a party to participate. *Id.* Here, there is no basis for conduct-based fees because respondent did not unreasonably lengthen the proceedings and it was not unreasonable for respondent to defend a district court decision that was in his favor upon appeal by the opposing party. And, we find no basis for need-based fees. Appellant has not shown that she lacks the means to pay her own fees, that respondent has the means to pay them, and that the award is necessary to permit her participation in litigation. Appellant's motion for attorney fees on appeal is denied.

Affirmed in part, reversed in part; motion denied.