STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1052

In re the Marriage of:
Anthony Frank Novak, petitioner,
Appellant,

vs.

Linda Sue Novak, n/k/a Linda Sue Koskiniemi,
Respondent.

Filed April 14, 2009
Affirmed
Crippen, Judge[*]

Goodhue County District Court
File No. 25-F1-99-001399

Linda R. Allen, Butler, Huson & Allen, P.A., 2330 U S Bank Center, 101 Fifth Street East, St. Paul, MN 55101 (for appellant)

Jill I. Frieders, O'Brien & Wolf, L.L.P., 206 South Broadway, Suite 611, PO Box 968 Rochester, MN 55903-0968 (for respondent)

Considered and decided by Lansing, Presiding Judge; Kalitowski, Judge; and Crippen, Judge.

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

CRIPPEN, Judge

On appeal from orders of the district court and a child support magistrate (CSM) denying his motions to forgive his maintenance arrears and reduce his child-support

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

obligation, appellant Anthony Novak challenges the unfavorable view of his job change and the denials of his motions. We affirm.

FACTS

In a proceeding to modify appellant's child-support and maintenance obligations, the district court adopted the parties' agreement to terminate appellant's prospective maintenance obligation as of the remarriage of respondent Linda Novak, n/k/a Linda Koskiniemi. The district court also denied appellant's motions for an evidentiary hearing and for forgiveness of his maintenance arrears, and deferred to a CSM appellant's motion to reduce his support obligation, which the CSM subsequently denied.

D E C I S I O N

I.

Appellant challenges the failure of both the district court and CSM to find that his job change was in good faith and required a reduction of his maintenance and support obligations. We are not to alter a finding of fact unless the finding is clearly erroneous. Minn. R. Civ. P. 52.01. A finding is clearly erroneous if the reviewing court is left with a definite and firm conviction that a mistake was made. *Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 101 (Minn. 1999). We defer to a district court's credibility determinations and view the record in the light most favorable to the findings. *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988); *Lossing v. Lossing*, 403 N.W.2d 688, 690 (Minn. App. 1987). That a record could support findings other than those that were actually made does not necessarily show that the findings that were made are clearly erroneous. *Vangsness v. Vangsness*, 607 N.W.2d 468, 474 (Minn. App. 2000).

Appellant argues that his job change was involuntary. The CSM's ruling to the contrary is consistent with a letter to appellant from his former employer indicating that the former employer tried to rehabilitate appellant's medical practice by giving him recommendations and suggesting that if he did not adopt the recommendations, there would be an investigation, but not necessarily disciplinary action. Citing his own testimony as expert testimony on the implications of the meeting generating this letter, appellant argues that the CSM inaccurately viewed the facts. But the CSM's failure to adopt appellant's view of the meeting, the resulting letter, and his separation from his former employment shows that the CSM found appellant not credible on these subjects. On this record, appellant has not shown that the CSM clearly erred in finding that he voluntarily left his former employment.

Appellant cites *Lee v. Lee*, 459 N.W.2d 365 (Minn. App. 1990), *review denied* (Minn. Oct. 18, 1990), to argue that if a party is given no choice but to resign, the resignation is involuntary for child-support purposes. But *Lee* is distinguishable. There, the obligor was going to lose his job, and the question was whether that loss would occur by resignation or termination. *Lee*, 459 N.W.2d at 367. Here, because appellant's former employer was trying to rehabilitate him, he was not certain to lose his job.

Under *Giesner v. Giesner*, 319 N.W.2d 718, 719-20 (Minn. 1982), an obligor who, in good faith, changes jobs and earns less money, can have his obligations reflect the lower income. Appellant argues that both factfinders failed to adequately address

Gienser.[1] Under *Giesner*, good faith is absent if there is no "reasonable effort" by the obligor to satisfy his obligations; if the obligations were within the obligor's "inherent but unexercised capacities." *Giesner*, 319 N.W.2d at 719-20. The CSM found that "[appellant's] change of employment was voluntary," "he has not sustained a loss in his ability to earn income," and "he has chosen to invest in his business enterprises rather than to generate personal income." Similarly, the district court found that appellant failed to make "a sufficient effort to ensure that he would be able to satisfy his spousal maintenance obligation." Thus, the factfinders do not believe that appellant acted in "good faith" or made a "reasonable effort" to meet his obligations. For this reason, any failure by the CSM and the district court to strictly address *Giesner* is immaterial because *Giesner* would have been deemed unsatisfied.

The CSM also found that, instead of seeking employment with another hospital, appellant tried to become self-employed. Appellant asserts that "[e]mployment at another clinic so soon after a forced resignation was not a viable option." This argument

[1] The weight to be given a solely *Giesner*-based analysis is limited. *Giesner* addressed a then-existing gap in the statutes, which the legislature later filled. *Putz v. Putz*, 645 N.W.2d 343, 350 (Minn. 2002). Under the current statute, the *Giesner* good-faith test has been replaced by the requirement that an obligor show that his employment status is temporary and will lead to increased income, is a bona fide career change outweighing the adverse effect on the child of the lower income, or is a result of incapacitation. Minn. Stat. § 518A.32, subd. 3 (2008); *see also Putz*, 645 N.W.2d at 351 (stating, under the prior statute, that unless the obligor shows the existence of statutory circumstances, support is to be set based on imputed income). Thus, satisfying merely *Giesner* would not necessarily satisfy the statute and entitle appellant to have his obligations set based on his decreased income. And the findings of the CSM and district court that appellant's job change was voluntary and that he failed to adequately plan his job change preclude making the prescribed statutory findings.

assumes that appellant involuntarily separated from his former employer, and we affirm the CSM's contrary finding. Moreover, appellant does not challenge the finding that he did not seek employment with another hospital; as a result, the viability of his doing so is unclear.

Appellant also challenges the CSM's finding, one among several regarding his job change, that he "has chosen to invest in his business enterprises rather than to generate personal income[.]" He argues that the finding is inaccurate because it "imp[lies]" both that "'ability to earn income' is the applicable measure and that [his] subjective intent is to merely invest in his own enterprises without anticipation of earning a living." But the record supports the challenged finding, which therefore stands without regard for what the finding "imp[lies]."

Appellant's post-separation expenditures on a new medical practice were not "to generate personal income" because he knew or should have known that he lacked a reasonable likelihood of producing sufficient income from a new practice to allow him to meet his expenses. Relevant to this state of mind, the record shows that appellant spent over $600,000 trying to open a clinic in a location that he later had to abandon, at least temporarily, because the location was covered by a noncompete clause with his former employer. Also, because of his systematic failure to use proper billing codes, the ability of appellant's new practice to receive reimbursement from certain insurance providers was at least temporarily reduced. These errors are sufficiently fundamental to the practice of medicine that they justify the CSM's inference that appellant was not adequately seeking to generate income. *See Baker v. Citizens State Bank of St. Louis*

Park, 349 N.W.2d 552, 558 (Minn. 1984) (stating that district courts may draw inferences from circumstantial evidence); *Vangsness*, 607 N.W.2d at 472-73 (stating appellate courts view evidence in the light most favorable to the findings).

II.

Whether to modify support is discretionary with the CSM, and relief may be granted if there has been a substantial change in the obligor's circumstances, including his income, rendering the existing obligation unreasonable and unfair. Minn. Stat. § 518A.39, subd. 2 (2008); *Putz*, 645 N.W.2d at 348.

Citing his actual income, appellant argues that substantially changed circumstances render his existing support obligation unreasonable and unfair. But based on its finding about the circumstances of appellant's job change, the CSM, consistent with Minn. Stat. § 518A.32, ruled that appellant's earning ability had not changed and his existing obligation remained appropriate. Because there is no merit in appellant's contentions with respect to his job change, the CSM correctly denied modification.

Appellant argues that the CSM overstated his ability to pay support because he "has liquidated his available assets and is now using and exhausting his credit to meet his own basic obligations." But this argument, because it is merely a variation on the already-rejected argument that appellant's actual income should be the basis for assessing the propriety of his obligations, is also without merit.

III.

A stipulated provision in the parties' dissolution judgment sets appellant's monthly maintenance obligation at $12,627 when his income is between $375,000 and

$425,000, and states that if his gross annual income is not within that range, maintenance will be modified to 38.7% of his gross income. Modification of maintenance can occur if the moving party shows a substantial change in circumstances rendering the existing award unreasonable and unfair. Minn. Stat. § 518A.39, subd. 2. Although the question of whether to modify maintenance is discretionary with the district court, a stipulated maintenance provision should be modified "carefully and only reluctantly." *Claybaugh v. Claybaugh*, 312 N.W.2d 447, 449 (Minn. 1981). Still, the existence of a maintenance stipulation does not bar modification. *Hecker v. Hecker*, 568 N.W.2d 705, 709 (Minn. 1997).

Appellant argues that setting his maintenance obligation at 38.7% of his gross income for the period between his separation from his former employer and respondent's remarriage is unreasonable because it "do[es] not anticipate the impact of a pure percentage award of gross income when gross income falls substantially below the original level." But this argument ignores both the stipulated nature of the provision and the voluntary nature of what the district court found to be appellant's "elect[ion] to open a solo practice" without seeking employment at another hospital. The record creates no cause to reverse the district court based on an event explicitly contemplated by a stipulated provision in the dissolution judgment. *See Abbott v. Abbott*, 282 N.W.2d 561, 564 (Minn. 1979) (holding that a son's emancipation did not create substantially changed circumstances where the emancipation was specifically mentioned in the parties' stipulated judgment).

Appellant argues that the district court's view of the stipulation is internally inconsistent because it means that his arrears could not be forgiven despite the change in his income. But the district court also found that appellant made an inadequate effort to ensure his ability to pay maintenance. And because the record supports the findings that appellant did not seek stable employment and that he failed to adequately plan his solo practice, we reject his assertion that the maintenance ruling conflicts with the statutory provisions for modification.

Appellant argues that the voluntariness question was "the most important question in this case" and that the district court (which, unlike the CSM, did not make a finding stating voluntariness) should have held an evidentiary hearing on the question. Absent "good cause," the district court need not and cannot hold an evidentiary hearing on a motion to modify maintenance. Minn. Stat. § 518A.39, subd. 2(g); Minn. R. Gen. Pract. 303.03(d). Because appellant does not challenge the court's findings that he did not seek stable employment and that he failed to make an adequate effort to ensure his ability to pay his obligations, even if a hearing produced a finding that his separation from his former employer was involuntary, reversal of the maintenance decision would not be required. For this reason, if not others, "good cause" for a hearing was absent, and a remand is unnecessary. *See Grein v. Grein*, 364 N.W.2d 383, 387 (Minn. 1985) (refusing to remand where doing so would not alter the result).

Appellant challenges the district court's refusal to reduce his maintenance arrears, arguing that the judgment is "unjust," that it did not anticipate the extent of the decrease in his income, and that respondent has assets with which to meet her needs. But the

judgment contemplates a decrease in appellant's income, and we affirm the refusal to use appellant's actual income to address his motions. Appellant's argument has no merit.

IV.

Citing *Erlandson v. Erlandson*, 318 N.W.2d 36 (Minn. 1982), appellant argues that the findings of the CSM and district court are inadequate because they do not address respondent's alleged self-limitation of income arising from her living with her new spouse in a community where she cannot earn as much as she could earn if she lived in a metropolitan area. But *Erlandson* does not involve a remarried recipient of maintenance or support whose income was allegedly limited because she lived with her spouse. 318 N.W.2d at 39-40. An obligor does not violate Minn. Stat. § 518A.32, subd. 3 if the obligor's employment status arises from a "bona fide career change that outweighs the adverse effect of that parent's diminished income on the child." Minn. Stat. § 518A.32, subd. 3(2). Appellant has shown no authority for asserting that respondent's (the obligee's) choice to live with her spouse, with her resulting job change, runs afoul of the statute.

Appellant also alleges that respondent has in excess of $1 million in assets that must be considered in evaluating his motions. But much of the value awarded to respondent by the dissolution judgment was illiquid; the family home and retirement benefits. Consistent with the facts that respondent received no maintenance between appellant's July 2006 separation from his former employer and her May 2007 remarriage, as well as no child support after the end of 2006, respondent testified that she is liquidating assets to pay her expenses. Her annual potential income is about one-third of

her reasonable annual expenses. And although a maintenance recipient's investment income is to be considered, the recipient is not generally expected to liquidate assets to meet expenses. *Fink v. Fink*, 366 N.W.2d 340, 342 (Minn. App. 1985). The illiquidity of respondent's assets and the disparity between her potential income and reasonable expenses show that even if all of her assets were investable, she would still lack enough earnings to pay her expenses. Appellant's argument is unpersuasive.

Affirmed.