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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1196**

In re the Marriage of:
Dareth Molde, petitioner,
Respondent,

vs.

Troy Molde,
Appellant.

**Filed August 4, 2009
Affirmed
Schellhas, Judge**

Rice County District Court
File No. 66-F8-04-000484

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(for respondent)

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

UNPUBLISHED OPINION

SCHELLHAS, Judge

The district court amended a dissolution judgment after vacating and reopening it for fraud on the court. Appellant argues that the district court clearly erred in amending the original dissolution judgment. We affirm.

FACTS

The parties' marriage was dissolved in September 2005 by entry of a dissolution judgment based upon the parties' stipulation. While negotiating the terms of the stipulation, appellant Troy Molde, a realtor, represented that his 2005 net income would be approximately \$45,000 to \$50,000. The parties used this income range to calculate appellant's child-support obligation.

After entry of the dissolution judgment, appellant sought review by this court of a temporary child-support order issued prior to entry of the dissolution judgment. While that appeal was pending, respondent Dareth Molde moved the district court to vacate and reopen portions of the judgment and decree on the grounds that appellant misrepresented his income. Respondent brought her post-decree motion after she read an advertisement published by appellant's realty team. The realty-team advertisement claimed that (1) the team, consisting of appellant and his brother-in-law, brokered \$20 million in sales in 2005 and (2) appellant was in the top one percent of realtors nationwide. Respondent supported her motion with an exhibit summarizing Multiple Listing Service (MLS) information that showed that appellant's real-estate sales totaled more than \$4 million in 2005. Based on those sales, respondent calculated appellant's commissions in 2005 to be more than \$130,000.

In January 2006 the district court vacated and reopened portions of the dissolution judgment and decree and set a trial on the issues of child support and maintenance. Appellant sought review by this court of the district court's January 2006 order, and his

appeal was consolidated with his pending appeal from the temporary child-support obligation.

In an unpublished decision, this court affirmed both district court orders, noting that the district court vacated and reopened portions of the judgment and decree “after determining that appellant substantially misrepresented his net income at the time of trial and that the misrepresentation arose to the level of fraud on the court.” *Molde v. Molde*, No. A05-2295, 2006 WL 2677295, *5 (Minn. App. Sept. 19, 2006) (quotation omitted) (*Molde I*), review denied (Minn. Dec. 12, 2006). We determined that the district court did not abuse its discretion by vacating and reopening portions of the judgment and decree. *Id.*

Following remand and before trial, respondent moved to compel discovery of documentation of business expenses that appellant claimed in determining his net business income as a realtor in 2005. Appellant opposed the motion on the bases that (1) the purpose of the trial was to determine whether respondent could prove fraud sufficient to vacate and reopen and (2) his business expenses were not at issue because respondent had not alleged fraud in the form of misrepresentation of business expenses.

The district court granted respondent’s motion to compel, stating:

Well, first of all, so there’s no misunderstanding, the court did find that [appellant] committed fraud on the court and reopened the case. We are not litigating the issue of whether or not there was fraud on the court. The court ruled that we are litigating all the issues, financial issues, related to that, which includes what his expenses are and not just his income.

But the record shows that throughout the four-day trial that spanned seven months, commencing August 28, 2007 and concluding March 24, 2008, appellant attempted to argue that respondent had not yet proved fraud and that his business expenses were not at issue.

For example, on the first day of trial, appellant testified on cross-examination about his business expenses. He agreed that the MLS information, showing that his total volume of sales in 2005 was close to \$5 million, was “approximately” accurate and that, based on that volume, the total commissions calculated by respondent of \$136,552.15 were “approximately” accurate. Appellant then moved for dismissal on the basis that respondent had not proved fraud. The district court responded that it found fraud sufficient to justify reopening the case, but “[t]hat doesn’t mean that there’s, in fact, fraud. That’s why we’re here, to see what the truth was concerning whether or not he . . . sold \$20 million dollars.” (Emphasis added.) Then, after respondent argued that appellant’s net business income was at issue and that she sought verification of expenses because of the possibility that he manipulated his expenses to reach a particular net business-income figure, the court denied appellant’s motion to dismiss. The district court reiterated that it had already found fraud and indicated that expenses were at issue by granting respondent a continuance so that she could review appellant’s business-expense documentation that she had not seen prior to trial.

Approximately three months later, on the second day of trial, appellant testified again on cross-examination and stated that he had given counsel everything he had regarding business expenses and that some of the business-expense documentation was

lost. Appellant then moved for a directed verdict, arguing again that the matter was before the district court on respondent's motion to reopen and vacate and, when the district court rejected that argument, arguing that his business expenses were not challenged before trial and that respondent had not proven misrepresentation. The district court rejected these arguments and denied appellant's motion for a directed verdict.

Appellant's direct examination spanned three days of the four-day trial, during which appellant testified that his accountant, Brian Hogan, prepared his 2004 tax returns based on "receipts and notations" and information such as invoices and copies of check ledgers and that his process for preparing his 2005 return was similar. Appellant explained that he brought information to Hogan, Hogan asked questions, and, as far as appellant knew, Hogan returned the documentation, although it was possible that Hogan had not returned all of the documentation to him. Appellant also testified that the "decision to put the actual figures on each of the lines reflected on schedule C" was made by Hogan after the two of them talked about it. The district court received into evidence Exhibit 13, offered by appellant as a summary of his business expenses for 2005.

Respondent called Hogan in rebuttal. Hogan testified that appellant provided the information that appeared on Schedule C and that Hogan did not "come up with those numbers" himself. Hogan noted that the Schedule C referred to documentation that he assumed was for vehicle expenses. When asked whether appellant provided him with any documentation of other expenses, Hogan said, "I have no idea." Hogan testified that he "would imagine" that the numbers included in appellant's 2005 Schedule C were

numbers that appellant provided him, but Hogan could not remember if appellant had provided documentation when the return was prepared.

On May 15, 2008, the district court filed an amended dissolution judgment, noting its previous order reopening the original judgment and stating that the trial was on the issue of appellant's income at the time of the divorce as it related to child support, maintenance, and attorney fees. The court made new findings of fact regarding appellant's income, set a new child-support figure under the *Hortis/Valento* formula, and awarded respondent \$10,000 in attorney fees. The court noted respondent's inability to pay all of her attorney fees and costs and appellant's contribution to the length of the litigation through his misrepresentation of income and failure to document much of his business expenses. The court stated that appellant "chose to be an obstructionist" when confronted with evidence of his misrepresentation, had not cooperated with discovery, and wrongfully blamed his accountant for his inability to document his claimed business expenses. This appeal follows.

DECISION

Fraud

Appellant first argues that the trial was really an evidentiary hearing to determine whether respondent established fraud sufficient to reopen the judgment and that respondent failed to prove fraud. We reject this argument. The January 2006 order found fraud, vacated and reopened the dissolution judgment, and set trial on the issues of child support and maintenance. We affirmed the district court's order in *Molde I*, and we

will not review the district court's decision to reopen and vacate the dissolution judgment a second time in this appeal.

Due Process

Appellant argues that his due-process rights were violated when the district court reached the issue of business expenses because he did not have notice that they were at issue. Appellant argues that because respondent did not allege fraud in misrepresentation of business expenses and did not challenge appellant's claimed business expenses in a motion, his business expenses were not at issue.

"This court reviews de novo the procedural due process afforded a party." *Zellman ex rel. M.Z. v. Indep. Sch. Dist. No. 2758*, 594 N.W.2d 216, 220 (Minn. App. 1999), *review denied* (Minn. July 28, 1999). Due process guarantees a party "reasonable notice, a timely opportunity for a hearing, the right to be represented by counsel, an opportunity to present evidence and argument, the right to an impartial decision-maker, and the right to a reasonable decision based solely on the record." *Humenansky v. Minn. Bd. of Med. Exam'rs*, 525 N.W.2d 559, 565 (Minn. App. 1994), *review denied* (Minn. Feb. 14, 1995).

Appellant's income for purposes of child support in 2005 is calculated under Minn. Stat. § 518.551, subd. 5b(f) (2004), which states that (1) a self-employed person's income is gross receipts less "ordinary and necessary expenses," and (2) if expenses are challenged, the person claiming the expense bears the burden of demonstrating that it is ordinary and necessary. Under subdivision 5b(f), net income "may be different from taxable income." Respondent's motion to vacate and reopen was premised on the

argument that appellant could not have received the net business income he claimed at the time of trial, if he was as successful as he claimed in the ad, or made the sales in the MLS information provided to the court. Inherent in respondent's motion is a challenge to the business expenses used to reach appellant's net-income figure. Notably, appellant's affidavit in response to respondent's motion attempted to justify his net business-income figure by explaining business expenses. We therefore reject appellant's argument that respondent's motion to vacate did not implicate business expenses.

We also reject appellant's argument that his business expenses were not challenged at trial. Before trial, the district court granted a motion to compel discovery regarding expenses and ruled explicitly that appellant's expenses were at issue. At trial, respondent repeatedly focused on business expenses. On the first day of trial there was some confusion about whether expenses were at issue, but the confusion was resolved when the district court ruled that expenses were at issue and granted respondent a continuance to review business-expense documentation that appellant brought to trial. And appellant's direct examination occurred months later, giving appellant time to prepare. During his direct examination, appellant offered Exhibit 13, a document summarizing his expenses.

Appellant also argues that confusion about the issues in the district court denied him due process, citing *Haefele v. Haefele*, 621 N.W.2d 758, 764-65 (Minn. App. 2001). But in *Haefele*, the confusion was greater than in this case and was not resolved. *Haefele* dealt with a district court hearing that "changed from a hearing on the motion to reopen to an evidentiary hearing on the issue of property division," which was a "critical"

distinction “because the burdens of proof differ.” 621 N.W.2d at 765. In *Haefele*, the district court made a “mid-trial decision to take evidence on property values” and did so before ruling on the motion to reopen. *Id.* *Haefele* also rested in part on prejudice from the confusion. In *Haefele*, it was clear from the record that the appellant “did not know when to cease rebutting [the] fraud and mistake claims and when to begin affirmatively presenting property value evidence.” *Id.* Here, the dissolution judgment had already been reopened, and the district court had set trial on the issues of child support and maintenance. On the first day of trial, there was confusion about the issues before the court, but the confusion was corrected before appellant presented his case. And the four-day trial spanned seven months, which gave appellant ample time to prepare his case in response to the district court’s rulings on the first and second days of trial.

Business-Expense Findings

Appellant argues that even if his business expenses were a proper issue in district court, the court’s findings on the issue are clearly erroneous. He argues that: (1) respondent failed to prove that the expenses were not ordinary and necessary; (2) the record showed the expenses were ordinary and necessary; and (3) the district court erroneously required documentation.

Findings of fact are reviewed for clear error and 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).

We reject appellant's arguments. Under Minn. Stat. § 518.551, subd. 5b(f), appellant had the burden at trial to show that his business expenses were ordinary and necessary. His argument that respondent failed to prove that his claimed expenses were *not* ordinary and necessary attempts to shift to respondent the burden to negate claimed expenses, which is contrary to the statute. The district court's findings about appellant's ordinary and necessary expenses are supported by substantial evidence in the record and are not clearly erroneous. And the district court did not erroneously require documentation. The findings are supported by Exhibit 12, which respondent offered as a summary of the business-expense documentation provided by appellant. While appellant testified that he had additional expenses, the district court rejected his testimony as not credible, a decision to which we defer. *See Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988) (stating that appellate courts defer to a district court's credibility determinations).

Other Findings

Appellant argues that the district court made several clearly erroneous findings that affected its decision, specifically that: (1) appellant's net-income representation in 2005 was a "gross underestimation of his net income" or "grossly misrepresented"; (2) appellant documented only \$61,057 in business expenses; (3) appellant is capable of paying his own attorney fees; (4) respondent is not capable of paying her own attorney fees; (5) the parties shared physical custody with each having the children 50% of the time; (6) appellant alleged the \$20 million ad was "puffing" and failed to provide documentation of his business expenses before the district court granted the motion to

vacate and reopen; (7) appellant failed to document and could not verify his business expenses in discovery or at trial; (8) Hogan's testimony was not consistent with appellant's; and (9) appellant did not cooperate with discovery, was unable to document his expenses, and wrongfully blamed Hogan.

As previously discussed, the district court's findings regarding appellant's business expenses are supported by substantial evidence and are not clearly erroneous. Based on the evidence, appellant's net business income was much greater than he represented in 2005. The district court's characterization of appellant's income as being a "gross underestimation" or "grossly misrepresented" is not clearly erroneous.

Appellant argues that the district court lacked evidence from which to determine the parties' abilities to pay attorney fees. We acknowledge that the inquiry into the parties' financial circumstances was limited at trial, but the district court made a conduct-based fee award under Minn. Stat. § 518.14, subd. 1 (2008), which does not require findings regarding the need for and ability to pay attorney fees. We therefore conclude that any error in the district court's findings regarding ability to pay fees was harmless. *See* Minn. R. Civ. P. 61 (requiring that harmless error be disregarded).

The district court used a 50% sharing of parenting time to calculate child support under the *Hortis/Valento* formula. Appellant argues that the district court's amended finding that each party has the children 50% of the time is contrary to the original dissolution judgment, which provides that he has the children 53% of the time.

We note that the original dissolution judgment awards the parties joint physical custody, characterizing each as having "equal" custody of the children, and that child

support was originally calculated under the *Hortis/Valento* formula based on the parties dividing time “fairly equally.” Appellant does not direct us to the specific part of the original dissolution judgment that he claims provides that he has the children 53% of the time. The original dissolution judgment contains an “example” chart showing how the parties’ 5-day/4-day reversing schedule would work over a given 28-day period, and appellant has 53% of the days appearing on the chart. Presumably, appellant is relying on this example chart to argue that he was granted 53% of the time with the children in the original dissolution judgment.

A district court may interpret a prior order. *Stieler v. Stieler*, 244 Minn. 312, 318-19, 70 N.W.2d 127, 131 (1955). When a prior order is ambiguous, the district court may receive evidence on the issue and resolve the ambiguity as a factual matter and the resolution of the ambiguity is reviewed for clear error. *Donnay v. Boulware*, 275 Minn. 37, 44, 144 N.W.2d 711, 716 (1966); Minn. R. Civ. P. 52.01. Here, the dispute over the correct percentage of time to use in calculating child support was presented to the district court in respondent’s written closing argument. Presentation of the dispute and the district court’s ruling that followed are tantamount to a finding of ambiguity, and the district court’s resolution implicitly found that respondent’s reading of the dissolution judgment is correct. *See Erickson v. Erickson*, 449 N.W.2d 173, 178 (Minn. 1989) (“Disagreement between the parties as to the interpretation of a dissolution decree may be tantamount to a finding of ambiguity.”). This finding is not clearly erroneous. The original dissolution judgment states that physical custody is equal and that the parties

calculated child support under the *Hortis/Valento* formula “assuming that both parties will split time fairly equally.”

Appellant argues that the district court incorrectly stated that he opposed respondent’s motion to vacate by alleging that the ad was mere “puffing” and failed to provide documentation of his business expenses. The district court’s language in this portion of its order summarized its own findings made in the January 2006 order and, as already addressed, we will not review for a second time the findings contained in the January 2006 order.

Appellant argues that the district court erred in finding that he failed to document his business expenses in discovery and at trial. The findings are not clearly erroneous. Respondent was forced to bring a motion to compel discovery from appellant, and he documented only part of his business expenses and did not offer credible evidence in support of additional expenses. And on the first day of trial, appellant made clear through his testimony that he had not attempted to correlate the business expenses claimed on his Schedule C with his documentation, stating, “I told her what my income was, and I felt, you know, we were divorced. At what point do we move forward and I don’t have to be audited by my ex-wife?”

Appellant argues that the district court clearly incorrectly found inconsistencies between the testimony of appellant and Hogan. We disagree. Appellant testified that Hogan determined how expenses were allocated between categories and that Hogan determined the figures placed on the Schedule C. Hogan testified that the return was prepared based on information provided by appellant. We note that appellant also

testified that he and Hogan discussed the information in the return and that Hogan's testimony regarding documentation was that he did not remember if appellant gave him documentation. The findings reflect the district court's credibility determinations, to which this court defers, and we conclude that the findings are not clearly erroneous. *See Sefkow*, 427 N.W.2d at 210.

Appellant argues that the district court clearly erred in finding that appellant was an obstructionist, did not cooperate in discovery such that hearings regarding discovery were required, and, after being unable to document expenses, wrongfully blamed his accountant. These findings are supported by substantial evidence and, again, reflect the district court's credibility determinations, to which this court defers. *See id.*

Conduct-Based Award of Attorney Fees

Appellant argues that the district court abused its discretion in awarding \$10,000 in conduct-based attorney fees to respondent. He argues that respondent's counsel acted unreasonably, the district court's findings are clearly erroneous, and a fee award is not justified because he did not violate the law, assert unfounded legal positions, or fail to comply with discovery.

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. "An award of conduct-based fees under Minn. Stat. § 518.14, subd. 1, may be made regardless of the recipient's need for fees and regardless of the payor's ability to contribute to a fee award." *Geske v. Marcolina*, 624 N.W.2d 813, 818 (Minn. App. 2001). "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).

In support of its attorney-fee award, the district court found that:

[Appellant] is capable of paying his own attorney fees and costs in this proceeding.

[Respondent] is not capable of paying all of her own attorney fees and costs in this proceeding. This further lengthy litigation was necessary only because [appellant] grossly misrepresented his net income at the time of the initial trial. Also, during discovery and at trial, he failed to document much of his business expenses when requested, and that substantially contributed to the need for lengthiness of this litigation. [Respondent] has incurred attorney fees in this matter of approximately \$45,000. [Respondent] is entitled to a conduct based award of attorney fees of \$10,000.00.

The district court’s findings regarding appellant’s unreasonable contribution to the length and expense of proceedings are not clearly erroneous. The district court properly found that appellant misrepresented his income and did not cooperate with attempts to verify his business expenses. Appellant also repeatedly pursued the unfounded position that the trial scheduled on the issues of child support and maintenance was really an evidentiary hearing to determine whether the dissolution judgment should be vacated and reopened. The district court’s January 2006 order clearly identified the issues for trial, and this court’s affirmance ruled that the district court did not abuse its discretion in vacating and reopening. *See Redmond v. Redmond*, 594 N.W.2d 272, 276 (Minn. App. 1999) (affirming conduct-based fee award against party who took duplicitous and disingenuous positions that prolonged litigation); *Korf v. Korf*, 553 N.W.2d 706, 711 (Minn. App.

1996) (affirming conduct-based fee award that was based in part on a party's "noncooperation and obstinate position"). We conclude that the conduct-based attorney fee award does not constitute a clear abuse of discretion.

Affirmed.