STATE OF MINNESOTA
IN COURT OF APPEALS
A09-744

In re the Marriage of:

Justin Patrick Breitkreutz, petitioner,
Appellant,

vs.

Jacqulyn Jean Breitkreutz,
Respondent.

Filed January 12, 2010
Affirmed in part, reversed in part, and remanded
Shumaker, Judge

Anoka County District Court
File No. 02-F7-06-006584

Kurt Robinson, Kurt Robinson, P.A., Blaine, Minnesota (for appellant)

Carol M. Grant, Kurzman, Grant & Ojala, Minneapolis, Minnesota (for respondent)

Considered and decided by Shumaker, Presiding Judge; Worke, Judge; and Connolly, Judge.

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

SHUMAKER, Judge

Appellant-obligor challenges the district court's rulings (i) denying his motion to establish his child-support obligation under the combined parental income for

determining child support (PICS) guidelines, Minn. Stat. § 518A.35, subd. 1 (2008); (ii) failing to order a pro rata division of the cost of health insurance premiums in accordance with Minn. Stat. § 518A.41, subd. 5(a) (2008); (iii) denying his motion to require each party to bear the tax consequences attributable to their respective portion of the distribution from appellant's Home Depot 401(k); and (iv) denying his motion to forbear the interest on the property-equalization award. We affirm in part, reverse in part, and remand.

FACTS

On June 15, 2006, appellant Justin Patrick Breitkreutz filed a petition to dissolve his marriage to respondent Jacqulyn Jean Breitkreutz. After a trial, the district court entered its judgment and decree of dissolution on May 6, 2008. Among other things, the court awarded the physical custody of the parties' three minor children to respondent and set appellant's child-support obligation in accordance with child-support guidelines in effect when the proceeding was commenced. The court also ordered the appellant to provide health and dental insurance to the children and to pay $24,666 to respondent to equalize the property division the court awarded. The court further required appellant to pay as additional support 35% of any employment bonus he might receive.

On June 13, 2008, appellant brought a motion that he characterized as one to modify certain findings of fact and conclusions of law so as to reset his child-support obligation under the PICS guidelines, to require that the cost of dependent health-care coverage be apportioned between the parties, to allow him to pay the property-equalization cash award from his 401(k) account, and to require each party to bear the

income tax consequences respecting the sum the party receives from the 401(k) distribution.

The district court, in response, ordered that appellant pay monthly child support of $1,018.15 and 35% of any employment bonus but declined to apply the PICS guidelines, under which, according to appellant, his support obligation would be $905 per month. Also, the district court omitted all language regarding health-care cost apportionment. The court denied appellant's other motions.

Appellant brought a second motion that he characterized as one to modify his child-support obligation on November 13, 2008, so as to be consistent with the PICS guidelines. He also renewed his motion to be allowed to pay the property-equalization award from his 401(k) account and to require a division of income tax liabilities. The district court denied appellant's motion to modify child support, granted his motion to be allowed to use his 401(k) account to pay the property-equalization award, but denied appellant's motion to order a division of tax liabilities as a result of the 401(k) distribution.

Contending that the district court erred by refusing to apply the PICS guidelines, by failing to apportion the cost of dependent health-care coverage, and by failing to order that the parties bear their respective income tax liabilities resulting from the 401(k) distribution, appellant brings this appeal.

D E C I S I O N

Child Support

Appellant argues that the district court erred in setting his child-support obligation and in refusing to modify it. We recognize a district court's broad discretion in child-support matters and will not alter a district court's decision unless the court abused that discretion by resolving the matter in a clearly erroneous fashion that is "against [] logic and the facts on [the] record." *Gully v. Gully*, 599 N.W.2d 814, 820 (Minn. 1999) (quotation omitted). A district court abuses its discretion if it improperly applies the law. *Pikula v. Pikula*, 374 N.W.2d 705, 710 (Minn. 1985). We review questions of statutory interpretation and application de novo. *In re Kleven,* 736 N.W.2d 707, 709 (Minn. App. 2007) (citing *Brookfield Trade Ctr. v. County of Ramsey*, 584 N.W.2d 390, 393 (Minn. 1998)).

Appellant argues that the district court abused its discretion by failing to apply the newly enacted PICS guidelines in determining his child-support obligation. We disagree. The district court correctly determined that the former guidelines applied because this dissolution proceeding was commenced in 2006, before the PICS guidelines took effect. *See* 2006 Minn. Laws ch. 280, § 44, at 1145 ("The provisions of this act [the new PICS child-support law] apply to all support orders in effect prior to January 1, 2007, except that the provisions used to calculate parties' support obligations apply to actions or motions filed after January 1, 2007."). Appellant provides neither analysis nor authority to show that the PICS guidelines must be applied to the initial child-support award in this proceeding.

However, after January 1, 2008, child-support obligors and obligees could rely on the PICS guidelines to establish a change in circumstances justifying modification of a child-support obligation. *Rose v. Rose*, 765 N.W.2d 142, 147 (Minn. App. 2009) (citing Minn. Stat. § 518A.39, subd. 2(j) (2006)). Appellant moved to modify his support obligation on November 13, 2008. Therefore, he was entitled to rely upon the PICS guidelines in his attempt to show a substantial change in circumstances justifying modification of his obligation.

"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 v. Youker*, 661 N.W.2d 266, 269 (Minn. App. 2003). "The moving party must then demonstrate that these changed circumstances render the original award unreasonable and unfair." *Id.*

The guidelines provide for certain presumptions as to change of circumstances and as to the fairness of the original award that apply to motions to modify. Minn. Stat. § 518A.39, subd. 2(b) (2008). The only presumption that appellant argues applies to his situation is set forth in Minn. Stat. § 518A.39, subd. 2(b)(4) (2008), which provides for a presumption of substantially changed circumstances when an "existing support obligation is in the form of a statement of percentage and not a specific dollar amount." *Id.*

What appellant ignores, however, is that his existing support obligation is *not* in the form of a percentage. Rather, the district court required him to pay a specific dollar amount each month *plus* 35% of any employment bonus he may receive. The plain language of the statutory provision makes clear that substantially changed circumstances

will be presumed when a primary support obligation is stated in terms of a percentage only, not as a dollar amount *plus* a percentage of bonus income.

Setting support as a base amount plus a percentage of irregular income is disfavored. *Keil v. Keil,* 390 N.W.2d 36, 38 (Minn. App. 1986); *see McCulloch v. McCulloch*, 435 N.W.2d 564, 567 (Minn. App. 1989) (expressing the same disfavor for maintenance awards set as a base amount plus a percentage of irregular income). Setting an obligation in the disfavored fashion of a base amount plus a percentage of irregular income, however, was not necessarily an abuse of discretion under the former guidelines. *See Novak v. Novak*, 406 N.W.2d 64, 68 (Minn. App. 1987) (holding that the court acted within its discretion when including 35% of obligor's bonuses as income and allowing his children to share in his additional income), *review denied* (Minn. July 22, 1987). The district court's order requiring payment of 35% of any bonus received in addition to the basic support obligation of $1,018.15 does not entitle appellant to a presumption of changed circumstances under section 518A.39, subdivision 2(b)(4), and does not otherwise constitute an abuse of discretion.

Appellant does not argue that any other change of circumstances has occurred which would justify the modification of his child-support obligation, and by his own calculation he is not entitled to the presumption outlined in Minn. Stat. § 518A.39, subd. 2(b)(1), which would only apply if his obligation under the new guidelines was at least 20% and $75 more or less than his current obligation. Because he did not assert any other qualifying change as justification for modification of his child-support obligation

and did not demonstrate entitlement to the presumptions in paragraph (b), the district court did not abuse its discretion in denying appellant's motions to modify child support.

Health-Care Coverage

Appellant is correct that, under the PICS guidelines, the district court must divide "the cost of health care coverage and all unreimbursed and uninsured medical expenses" between the parties. Minn. Stat. § 518A.41, subd. 5(a) (2008). But his argument is incorrectly based on the premise that the PICS guidelines apply to his child-support obligation. Because he has not demonstrated entitlement to the application of those guidelines to the judgment and because his November 13, 2008 motion to modify did not seek to modify the medical support aspect of his child-support obligation, the argument regarding division of health and dental costs must be considered under the former child-support guidelines that were applicable to the judgment.

Under Minn. Stat. § 518.171, subd. 1(a)(1) (2004), child-support orders must "expressly assign or reserve the responsibility for maintaining medical insurance for the minor children and the division of uninsured medical and dental costs." In its original decree, the district court ordered appellant to maintain family health and dental insurance, and required respondent to pay a pro rata share of the premiums. Thus, the original decree expressly assigned or reserved the responsibility for maintaining medical insurance for the children. But the court later deleted the health and dental cost provisions in its post-decree orders, without explanation. The district court erred when it omitted this provision. Therefore, we reverse and remand that issue for the district court to provide for an appropriate division of uninsured medical and dental costs.

Equalization Award

The district court originally awarded to respondent $24,666 as a property-division equalizer. Appellant moved to be allowed to distribute a portion of his 401(k) to satisfy this debt, and for an order requiring the parties to bear their respective income tax burdens from the 401(k) distribution. The court granted to him the right to distribute the property-division equalizer from his 401(k), but denied his motion regarding sharing the tax consequences. On appeal, appellant claims that the property division is now unequal because he will bear the entire tax liability from the distribution.

The law does not require an exactly equal division of property, but rather only a fair and equitable one. Minn. Stat. § 518.58, subd. 1 (2008); *see also Crosby v. Crosby*, 587 N.W.2d 292, 297 (Minn. App. 1998) ("An equitable division of marital property is not necessarily an equal division."), *review denied* (Minn. Feb. 18, 1999); *Justis v. Justis*, 384 N.W.2d 885, 888 (Minn. App. 1986) ("[T]he property division need not be mathematically equal to be just and equitable."), *review denied* (Minn. May 29, 1986). The district court has broad discretion to divide property in dissolution actions and its decision will not be overturned on appeal except for a clear abuse of discretion. *Reck v. Reck*, 346 N.W.2d 675, 678 (Minn. App. 1984), *review denied* (Minn. Apr. 25, 1984).

Appellant has failed to demonstrate what the tax consequences will be if he liquidates his 401(k), and concedes that he "does not know and cannot indicate whether the [district] court's property division is disproportionate." Appellant's failure to demonstrate a disproportionate division of the property award concludes the issue. It is

his burden to show an abuse of discretion. He has not done so. *Midway Ctr. Assocs. v. Midway Ctr., Inc.*, 306 Minn. 352, 356, 237 N.W.2d 76, 78 (1975).

Moreover, his argument is not tenable. He claims that the court was obligated to designate the method of his payment of the equalizer and its tax consequences. He has not provided authority for that claim. The district court simply allowed him to determine how he would pay the property equalizer, and he proposed the method of payment. The district court may generally consider tax consequences in determining the valuation of the property to be divided in a dissolution proceeding if: "(1) the tax consequences are immediate, and (2) the tax consequences are readily calculable." *Kriesel v. Gustafson*, 513 N.W.2d 9, 14 (Minn. App. 1994). The district court, however, "may not consider the tax consequences of a property award when to do so would force the court to speculate." *Pekarek v. Pekarek*, 362 N.W.2d 394, 397 (Minn. App. 1985) (citing *O'Brien v. O'Brien*, 343 N.W.2d 850, 854 (Minn. 1984)). Because there is no evidence in the record of the tax consequences of withdrawing money from appellant's 401(k), the district court did not abuse its discretion by not considering such tax consequences. Accordingly, we affirm this issue.

Interest

Finally, appellant argues that the district court erred in denying his motion to forbear the interest on the property equalization award, but the record does not show that he ever requested such an action or raised the issue in any motion. Absent special circumstances, we do not generally consider matters not argued to the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). Appellant does not show why this

claim should be considered in the interests of justice, and we therefore decline to address it.

Affirmed in part, reversed in part, and remanded.