STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0056, A13-0460

In re the Marriage of:
Paul Edward Stutler, petitioner,
Appellant,

vs.

Cristina Araica Moreno,
f/k/a Cristina Moreno Stutler,
Respondent.

Filed February 3, 2014
Affirmed in part, reversed in part, and remanded
Minge, Judge[*]

Dakota County District Court
File No. 19HA-FA-10-816

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Considered and decided by Stauber, Presiding Judge; Bjorkman, Judge; and Minge, Judge.

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

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

MINGE, Judge

Appellant-husband Paul Stutler challenges various decisions of the district court setting and then modifying spousal maintenance and child support, increasing his required life-insurance coverage, treating his bonuses as income, disregarding his payments under the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA) as an expense, considering inadmissible and outside-the-record evidence, including a mortgage expense in wife's budget, and increasing his proportionate responsibility for the expenses of his son's extra-curricular activities. Respondent-wife Cristina Moreno challenges the district court's limited award of attorney fees. Both parties appeal the district court's determination of wife's ability to earn $6,000 per year. We affirm in part, reverse in part, and remand.

FACTS

The parties married in 1986 and had four children. The parties' youngest child was born in 2001 and has Down Syndrome. The parties separated in 2009. They attempted to resolve issues related to their marriage dissolution in the collaborative-law process and agreed to use a consensual special magistrate (CSM). All issues except certain matters related to spousal maintenance and child support were addressed in a stipulated settlement accepted by the CSM and ultimately incorporated in a dissolution judgment and decree dated September 19, 2011. Husband was then unemployed, and the decree established a fund to cover the parties' living expenses. The amount of maintenance, support, and related issues were left open until after husband gained employment.

Husband commenced employment in October 2011. In a series of proceedings that included orders dated November 30, 2011, June 1, 2012, November 20, 2012, and February 11, 2013, the CSM decided various child support and spousal maintenance matters, including the commencement and level of basic payments, life insurance to secure those payments, wife's earning capacity, the parties' net income and expenses, and attorney fees. The district court countersigned the CSM's decisions. The proceedings and rulings were complicated by husband's changing, and improving, employment. Both parties appeal.

Facts relevant to the issues are summarized in the analysis of each issue.

D E C I S I O N

The district court appointed a CSM to hear this case. *See* Minn. Stat. §§ 484.76, subd. 2 (2012) ("Alternative dispute resolution methods provided for under the rules must include . . . consensual special magistrates . . . for binding proceedings with a right of appeal . . . ."), 484.74, subd. 2a (2012) (stating criteria for appointing a CSM); Minn. R. Gen. Pract. 114.02(a)(2) (defining the CSM process as "[a] forum in which the parties present their positions to a neutral in the same manner as a civil lawsuit is presented to a judge" and "[t]his process is binding and includes the right of appeal to the Minnesota Court of Appeals.").[1] The parties agreed that the CSM would preside over proceedings in the event of an appeal and remand.

[1] We cite the most recent version of the statutes in this opinion because they have not been amended in relevant part. *See Interstate Power Co. v. Nobles Cnty. Bd. of Comm'rs*, 617 N.W.2d 566, 575 (Minn. 2000) (stating that, generally, "appellate courts apply the law as it exists at the time they rule on a case").

In countersigning the CSM's decisions, the district court adopted them. We review the countersigned CSM's decisions as decisions of the district court. *See Buller v. Minn. Lawyers Mut.*, 648 N.W.2d 704, 710 (Minn. App. 2002) (reviewing the CSM's decision adopted by the district court as a decision of the district court), *review denied* (Minn. Aug. 20, 2002).

I. Retroactivity.

A. Generally.

The first issue is whether the June 1, 2012 Order to Amend Judgment and Decree impermissibly awarded retroactive child support and spousal maintenance for October and November 2011. Husband argues that the award violates a statute and caselaw.

Based on less specific prior statutes, this court typically held that "[w]here no prior order to pay child support existed, it is improper to give a support order retroactive effect." *Paulson v. Paulson*, 381 N.W.2d 53, 53, 55 (Minn. App. 1986).[2] Note that the statute applies to both child support and spousal maintenance.

Current Minnesota law is quite specific, providing:

> A modification of support or maintenance, including interest that accrued pursuant to section 548.091, may be made

[2] For example, Minn. Stat. § 518.64, subd. 2 (1984) provided, in pertinent part, that a

> *modification* which decreases *support or maintenance* may be made retroactive only upon a showing that any failure to pay in accord with the terms of the original order was not willful. A *modification* which increases *support or maintenance* shall not be made retroactive if the obligor has substantially complied with the previous order.

(Emphasis added.)

> retroactive only with respect to any period during which the petitioning party has pending a motion for modification but only from the date of service of notice of the motion on the responding party and on the public authority if public assistance is being furnished or the county attorney is the attorney of record.

Minn. Stat. § 518A.39, subd. 2(e) (2012). This provision has been applied to prohibit the district court from retroactively modifying child support and spousal maintenance even when the parties stipulate to such a retroactive award. *Leifur v. Leifur*, 820 N.W.2d 40, 43 (Minn. App. 2012), *review dismissed* (Minn. Nov. 1, 2012). This court reasoned parties cannot by stipulation allow a court to act in a way prohibited by the legislature. *Id.* at 43. In sum, the general rule is that the district court is prohibited from retroactively awarding support and maintenance. This court has stated that "[w]here support [is] reserved, . . . generally, where no prior order to pay child support exists, it is improper to give a support order retroactive effect." *Eisenschenk v. Eisenschenk*, 668 N.W.2d 235, 243 (Minn. App. 2003) (quotation omitted), *review denied* (Minn. Nov. 25, 2003).

Here, the September 19, 2011 judgment and decree reserved the issues of spousal maintenance and child support subject to other provisions in the order. The other relevant provisions discussing husband's court-supervised employment search are as follows:

> (b.) If within ten (10) business days of receipt by [wife] of notice and documents from the CSM, [wife] does not object to [husband's] employment decision, a hearing shall be scheduled regarding the calculation of child support and spousal maintenance. (c.) If [wife] objects to [husband's] employment decision, then a hearing shall be scheduled regarding both [husband's] employment decision and the calculation of child support and spousal maintenance. (d.) Review Hearing. In any event, a review hearing on spousal maintenance and child

> support may take place at any time after December 1, 2011 at the request of either party or upon sale of the marital homestead.

Husband began new employment on October 2, 2011. The record reveals that wife received all the relevant documents regarding husband's new job by November 8, 2011, triggering the above-mentioned 10 business day period. Wife did not object to husband's new employment. Husband concedes that wife verbally requested child support and spousal maintenance on November 18, 2011. Based on the structure of the September 19 order, the hearing was to be automatically scheduled by the CSM. There was no need for wife to serve a motion and notice of motion. The record does not indicate when the CSM gave the parties notice of the hearing.

In its November 30, 2011 Interim Temporary Support and Maintenance Order, the CSM granted temporary child support and temporary spousal maintenance beginning December 1, 2011. That interim temporary order interpreted wife's November 18 request as a request for support and maintenance retroactive to October 1, 2011. Although the November 30 order did not otherwise discuss reservation of child support and spousal maintenance, the June 1, 2012 order stated that "retroactive support for the months of October and November 2011 . . . was reserved in the Interim Temporary Support and Maintenance Order filed November 3[0], 2011."

In its June 1, 2012 Order to Amend Judgment and Decree, the CSM ordered husband to pay $10,800 to wife for "retroactive support for the months of October and November 2011." The CSM's November 20, 2012 order explains that "[o]n December 6, 2011, the parties appeared before the undersigned at a hearing to establish child support and spousal

maintenance. It is the Court's recollection that, at that time, the parties and the Court agreed that the Court would establish child support for October and November, 2011." As we have previously discussed, the statutory prohibition precludes the parties from stipulating to the district court's making a retroactive modification. *Leifur*, 820 N.W.2d at 40, 43. Furthermore, as husband notes, no record was made of this agreement for retroactivity, and we therefore do not consider the alleged agreement. *See Holt v. State*, 772 N.W.2d 470, 481 n.5 (Minn. 2009) ("[A]n appellate court may not base its decision on matters outside the record on appeal." (quotation omitted)).

Wife argues that the general rule denying retroactive awards is overcome here because husband delayed in informing her of his new employment. Our caselaw does not support this basis for limiting the statutory preclusion of retroactivity. Harm due to deliberate delay of husband's disclosure may be addressed otherwise. *See* Minn. Stat. § 518.145, subd. 2 (2012) (listing bases on which court may reopen a ruling); Minn. Stat. § 518A.38, subd. 6 (2012) (stating that Minn. Stat. § 518.145, subd. 2, applies to awards of child support).

We conclude that the district court erred by granting child support and spousal maintenance beginning October 1, 2011. We reverse and remand with instructions that support and maintenance begin November 18, 2011, the first date wife requested that an upcoming hearing set support and maintenance. Although the CSM's February 11, 2013 order awarded $3,500 in conduct-based attorney fees in part for loss of retroactivity, the award was in the context of having also awarded a certain amount of retroactive support and maintenance. We do not know what attorney fees would have been ordered without that

retroactive award. With this reversal of retroactive support and maintenance, we direct the court on remand to consider whether the conduct-based attorney fees should be modified and authorize the CSM to reopen the record to consider this matter.

B. Due process and guideline child support.

Husband argues that the retroactive awards of spousal maintenance and child support for October and November 2011 deprived him of procedural due process. Husband also argues that it was error for the CSM/district court to provide retroactive child support in excess of the statutory guidelines without explanation. Because we have reversed the retroactive awards, we need not reach these issues. However, we note that the CSM awarded child support above the net basic support guidelines, and such an award must be accompanied by findings explaining the need for such additional funds. *See generally* Minn. Stat. § 518A.43, subd. 1(1)–(3) (2012) (providing that a deviation from a presumptive child-support obligation requires considering factors including (1) the earnings, income, and resources of each parent; (2) the extraordinary financial needs and resources, physical or emotional condition, and educational needs of the children; and (3) the standard of living the child would enjoy if the parents lived together). On remand, any child-support award in excess of statutory guidelines shall be accompanied by appropriate findings.

II. Husband's life insurance obligation.

The next issue is whether the November 20, 2012 Second Amended Judgment and Decree impermissibly orders husband to maintain $750,000 in life insurance to secure his child support and spousal maintenance obligations.

"The district court has discretion to consider whether the circumstances justifying an award of maintenance also justify securing it with life insurance." *Kampf v. Kampf*, 732 N.W.2d 630, 635 (Minn. App. 2007) (quotation omitted), *review denied* (Minn. Aug. 21, 2007); *see also* Minn. Stat. § 518A.71 (2012) ("In all cases when maintenance or support payments are ordered, the court may require sufficient security to be given for the payment of them according to the terms of the order.").

While remanding a case for other reasons, the Minnesota Supreme Court stated that "[i]nsurability and cost of insurance seem to us to be significant facts in determining both the propriety of an insurance requirement and the impact of the cost of insurance on [the husband's] monthly expenses. The district court should make factual findings on these issues as well on remand." *Lee v. Lee*, 775 N.W.2d 631, 642–43 (Minn. 2009). Minnesota Supreme Court dicta "is entitled to considerable weight." *In re Bush's Estate*, 302 Minn. 188, 207, 224 N.W.2d 489, 501 (1974). Requiring a finding of insurability and cost of insurance is necessary to avoid requiring a party to purchase insurance that is unavailable or unaffordable.

Here, according to an affidavit filed by husband in October 2012, husband had $662,000 in life insurance. The record indicates that the parties stipulated to the husband maintaining $200,000 in life insurance at the time of the original dissolution order. Husband obtained an additional $462,000 in insurance through his employer, bringing his coverage up to $662,000 in life insurance. However, the CSM made no findings, and the record lacks evidence on whether husband can obtain the remaining $88,000 needed to reach $750,000 in life insurance, and, if so, the cost of such a policy. These omissions are error. We reverse

and remand. On remand, the CSM may open the record to receive evidence regarding availability, insurability, and cost of insurance, and shall reduce the insurance required to that available at a reasonable rate.

III. Husband's income and expenses.

A. Increased spousal maintenance obligations.

The next issue is whether the CSM/district court abused its discretion in its February 11, 2013 Modification Order by increasing husband's spousal maintenance obligation to reflect his increased income due to new employment.

A party moving to modify maintenance must show that substantially changed circumstances render the existing award unreasonable and unfair. Minn. Stat. § 518A.39, subd. 2(a) (2012). Husband argues that his increased income alone is not sufficient to support modification. *See Kaiser v. Kaiser*, 290 Minn. 173, 182, 186 N.W.2d 678, 684 (1971) (noting that, generally, courts will not modify maintenance on showing of "a favorable change in the circumstances of a divorced husband without an unfavorable change in the circumstances of the divorced wife or the children in her custody"). However, today the relevant statute permits modification "upon a showing of *one or more* of the following" grounds. Minn. Stat. § 518A.39, subd. 2(a) (emphasis added). Thus to the extent that *Kaiser* required a change in circumstances of both parties, it is not current law. We reject husband's *Kaiser*-based claim.

B. Standard of living.

Husband also argues that the February 11, 2013 order improperly increased spousal maintenance beyond the amount needed to maintain wife's standard of living. Appellate

courts review modification of spousal maintenance for abuse of discretion. *See Hecker v. Hecker*, 568 N.W.2d 705, 709–10 (Minn. 1997) (concluding that "the trial court did not **abuse** its discretion in identifying a substantial change in circumstances warranting a **modification** of the spousal maintenance award"). "The purpose of a maintenance award is to allow the recipient and the obligor to have a standard of living that approximates the marital standard of living, as closely as is equitable under the circumstances." *Peterka v. Peterka*, 675 N.W.2d 353, 358 (Minn. App. 2004). "Thus, a maintenance obligor has a duty, to the extent equitable under the circumstances, to support the maintenance recipient at the marital standard of living" that justifies modifying spousal maintenance even "despite the lack of an increase in the maintenance recipient's reasonable monthly expenses." *Id.* at 358–59.

Here, husband argues that the initial grant of spousal maintenance represents the marital standard of living. The CSM found in the June 1, 2012 Amended Judgment and Decree that "neither party will be able to maintain the standard of living the parties enjoyed during the marriage." The CSM's finding is supported by husband's decrease in income from over $300,000 per year prior to the parties' separation, to receiving approximately $140,000 per year as of October 2011. Husband's standard-of-living perspective is based on the aggregate of the parties' individual proposed yearly budgets, which was less than $140,000 (husband submitted expenses of $57,396; wife submitted expenses of $69,924; totaling $127,320). By November 2011, husband had found employment paying $140,000 per year. In August 2012, husband began new employment paying $228,000 per year plus a signing bonus and additional potential annual bonuses. Husband's argument that the district

court abused its discretion by modifying spousal maintenance in the February 11, 2013 order due to evidence of husband's improving circumstances fails because there is evidence that reasonably supports the CSM's finding that the maintenance award in the June 1, 2012 Amended Judgment and Decree did not reflect the prevailing marital standard of living.

Husband also argues that the district court improperly relied on evidence outside the record and from the mediation stage of the proceeding when it determined the marital standard of living in setting spousal maintenance in the February 11, 2013 Modification Order.

As previously stated in connection with the CSM's finding about off-the-record consultations with legal counsel, findings must be based on the record. *See Holt*, 772 N.W.2d at 481 n.5 ("[A]n appellate court may not base its decision on matters outside the record on appeal." (quotation omitted)). Equally important, absent consent of all parties, information obtained during mediation is not admissible in subsequent legal proceedings and is not part of the record. *See* Minn. R. Gen. Pract. 114.08(a) ("Without the consent of all parties and an order of the court, . . . no . . . fact concerning the [ADR] proceeding may be admitted in a trial de novo or in any subsequent proceeding involving any of the issues or parties to the proceeding."), (e) ("Notes, records, and recollections of the neutral are confidential, which means that they shall not be disclosed to the parties, the public, or anyone other than the neutral, unless (1) all parties and the neutral agree to such disclosure or (2) required by law or other applicable professional codes."); *cf. Sonenstahl v. L.E.L.S., Inc.*, 372 N.W.2d 1, 6–7 (Minn. App. 1985) (affirmed quashing of a subpoena requiring a

mediator to testify to a union negotiator's attitude during mediation based on a public policy informed reading of Minn. Stat. § 179A.01 (1984)).

Here, the February 11, 2013 Modification Order by the CSM considered standard-of-living evidence from mediation that was not otherwise part of the record. This order modified payments beginning October 1, 2012. Basing an order on this evidence was error. Therefore, we reverse the increase in spousal maintenance and child support contained in that February 11 order and remand for determination without regard to mediation and for reconsideration consistent with this opinion. The CSM in its discretion may open the record.

C. Husband's bonuses.

Husband raises the issue of whether the district court erred by including bonus payments in setting his spousal maintenance obligation.

"[G]ross income includes any form of periodic payment to an individual, including, but not limited to, salaries, wages, [and] commissions." Minn. Stat. § 518A.29(a) (2012). Section 518A.29(a) applies to spousal maintenance because "the legislature intended section 518A.29's definition of gross income to apply to chapter 518, which governs maintenance." *Lee*, 775 N.W.2d at 635 n.3. But even assuming without deciding that sources of gross income must be regular and periodic, we note that grants of spousal maintenance may consider more than income. *See* Minn. Stat. § 518.522, subd. 2 (2012).

It is within the discretion of the district court to grant spousal maintenance as a base sum plus a percentage of bonuses even if there is only one bonus payment. *See McCarthy v. McCarthy*, 301 Minn. 270, 272–73, 222 N.W.2d 331, 332–33, 375 (1974) (affirming a grant

of alimony and support that provided "$250 per month as permanent alimony, as well as fifty percent of any bonus received from Sico, Inc. during 1973"); *cf. McCulloch v. McCulloch*, 435 N.W.2d 564, 566 (Minn. App. 1989) ("[W]hen a trial court sets a party's maintenance obligation, bonuses which provide a dependable source of income may properly be included in calculation of future income." (quotation omitted)); *Novak v. Novak*, 406 N.W.2d 64, 68–69 (Minn. App. 1987) (affirming grant of *child support* where the district court "set support based on appellant's $1800 net monthly income and separately required him to pay 35% on bonuses if and when received"), *review denied* (Minn. July 22, 1987).

Here, the CSM granted $6,500 monthly as a "base sum" and "additional spousal maintenance" in the form of "25% of any gross income earned by [husband] over his present base salary of $228,000, whether it is designated as commissions, bonus, or otherwise . . . up to a maximum additional spousal maintenance due each calendar year of $20,000." The CSM also expressly directed that the husband's non-recurring $25,000 signing bonus for beginning employment was included in the amounts which constitute the basis for calculating added spousal maintenance. In a letter, the CSM later clarified that the additional spousal maintenance did not include "passive income" such as "stock dividends, interest, and the like."

This base-sum-plus-percentage-of-bonuses-maintenance award is proper for several reasons: (1) the CSM did not consider husband's bonuses when establishing the basic level of maintenance; (2) the reasonable needs of wife could include consideration of her special responsibilities in parenting the parties' Down Syndrome child and the parties' marital

standard of living; and (3) husband is to pay the additional sum only if and when he receives additional gross income, and there is a cap on the amount wife can receive.

We conclude that the district court did not abuse its discretion by granting spousal maintenance as a $6,500 base amount plus 25% of gross income, including cash bonuses, earned over $228,000, capped at $20,000.

D. Husband's TEFRA payment.

The next issue is whether the district court erred by determining husband's ability to pay spousal maintenance without considering TEFRA payments. TEFRA is a form of medical assistance to children classified as disabled. The program pays a personal care attendant to be with the child; the parental share of program costs varies based on income. Husband objects that at the time of the June 1, 2012 Amended Judgment and Decree, the CSM omitted husband's projected TEFRA payment of $668.97 per month from his expenses, leaving him with $615 per month less than needed to cover his accepted budget. Wife argues that any disregard of husband's TEFRA payment is of minimal consequence. The parties repeatedly mentioned TEFRA in their submissions to the CSM. TEFRA was referenced several times in hearings. The CSM explicitly referenced TEFRA in its decisions, but not in the context of the parties' reasonable monthly expenses.

We recognize that the district court may set spousal maintenance and child support at a level that leaves an obligor with a monthly shortfall. *See Ganyo v. Engen*, 446 N.W.2d 683, 687 (Minn. App. 1989) (affirming a budget despite a $201 shortfall); *Buhr v. Buhr*, 395 N.W.2d 433, 436 (Minn. App. 1986) (affirming a budget despite a $75 shortfall). But TEFRA is an expense that is too significant in this case to be disregarded. Here, under the

June 1, 2012 court order, there was a shortfall of almost $600 per month and the omission of the TEFRA in calculating available income was not addressed by the CSM.

We conclude that the district court abused its discretion in excluding husband's TEFRA payment from his expenses for the purposes of spousal maintenance. An error in setting spousal maintenance also affects child support. *See* Minn. Stat. §§ 518A.29(a) (noting "gross income" includes "spousal maintenance received under . . . the current proceeding"), (g), .34(b)(1) (noting that the child support obligation requires calculation of "the gross income of each parent under section 518A.29") (2012). Because husband's TEFRA payment was not included in his expenses for calculating spousal maintenance, we reverse the awards of spousal maintenance and child support in the June 1, 2012 Amended Judgment and Decree. Because it appears the error was continued into the November 20, 2012 Second Amended Judgment and Decree and the February 11, 2013 Modification Order, child support and maintenance in those orders are also reversed. We remand these three orders for recognition of the TEFRA payments in setting those awards and for a redetermination consistent with this opinion.

IV. Wife's income and expenses.

A. Wife's reasonable earning power.

In its June 1, 2012 Amended Judgment and Decree, the CSM found that wife could earn $6,000 per year. Husband and wife both present the issue of whether the district court abused its discretion in determining wife's earning power for the purposes of spousal maintenance. Wife further argues that the district court abused its discretion in determining her earning power for the purposes of child support.

1. Maintenance.

We turn first to spousal maintenance. "[I]n awarding maintenance, the district court must consider 'all relevant factors,' including the maintenance recipient's ability to meet needs independently, the time necessary for him or her to acquire education to secure appropriate employment, and the probability that he or she will become fully or partially self-supporting." *Passolt v. Passolt*, 804 N.W.2d 18, 25 (Minn. App. 2011) (quoting Minn. Stat. § 518.552, subd. 2 (2010)), *review denied* (Minn. Nov. 15, 2011). "In essence, the district court balances the recipient's needs against the obligor's ability to pay." *Maiers v. Maiers*, 775 N.W.2d 666, 668 (Minn. App. 2009); *see also Erlandson v. Erlandson*, 318 N.W.2d 36, 39–40 (Minn. 1982) (noting that, under the maintenance statute, "the issue is basically the financial needs of [one spouse] and her ability to meet those needs balanced against the financial condition of [the other spouse]").

An appellate court will not reverse a district court's maintenance award unless the district court abuses its "broad discretion." *Lee*, 775 N.W.2d at 637. A district court "abuse[s] its discretion by making findings unsupported by the evidence or by improperly applying the law." *Dobrin v. Dobrin*, 569 N.W.2d 199, 202 (Minn. 1997) (quotation omitted).

Here, the CSM discussed a neutral vocational assessment of wife's earning potential and her responsibility to raise her son with Down Syndrome. The vocational assessment noted that wife was "immediately employable" at entry-level positions as a "development assistant, an outreach specialist, and an interpreter," and that wife could expect to earn approximately $26,000 per year (about $12 per hour) if she worked on a full-time basis

without restriction. Alternatively, wife could seek training to return to a career compatible with her broadcast journalism master's degree. A journalism career would be "problematic" given wife's "age and lack of employment" in modern journalism. The assessment indicated that wife would need additional training to use her degrees. But this assessment did not weigh wife's obligation to care for the parties' youngest son; instead it "simply talks about [wife's] vocational abilities and her relationship to the labor market."

Wife last held a full-time position 22 years ago, but worked various part-time positions during the marriage. The record indicates that for a brief time during this divorce proceeding wife worked as a flight attendant. However, this effort to work is not controlling as wife had to quit due to scheduling issues. The CSM's findings indicate that wife abandoned her career to serve as the primary caretaker for the parties' four children. The youngest has Down's Syndrome. At the time the CSM first set maintenance, this son was 11 years old. He was in school for approximately seven hours each day. Wife's mother previously helped care for him, but the grandmother can no longer help due to the boy's increasing strength and her advancing age. An expert stated she knew of no day care or child care facility that would accept or be appropriate for the boy due to his age, range of disabilities, and need for one-to-one attention. However, as a part of the TEFRA program, he qualified for 4.75 hours per day of care from a personal care assistant at the time of this proceeding. Although wife stated that her son's condition made it necessary for her to go to his school to deal with problems and that she used his school time to recharge and run errands, she also stated that he was "not particularly" different from her other children in that she needed to pick him up from school "[m]aybe once, twice a year." The CSM

ultimately found that, while "the needs of [the youngest child] prevent [wife] from employment on a full-time basis," wife can earn $6,000 per year.

Husband argues that the district court abused its discretion by not imputing $22,000 of income per year to wife because of the neutral vocational assessment and wife's past part-time work. Although wife's flight-attendant job indicates that wife thought she could work, the job does not show she can work enough to earn $22,000 per year. We conclude that, given the youngest son's situation, husband fails to show why the CSM's finding limiting wife to $6,000 in income is clearly erroneous.

Wife argues that the district court clearly erred by imputing income to her because it was not reasonably probable that she would be able to earn $6,000 per year by working about 10 hours per week at about $12 per hour. Wife further argues that her prospects in returning to the labor force are too speculative.[3] We recognize that there is conflicting evidence on wife's availability for work. However, we defer to the CSM's findings made after weighing conflicting evidence. The record reasonably supports the following implicit findings by the CSM: (1) wife can work approximately four hours each day of the approximately seven hours their youngest son is in school, and (2) wife could get a job on a part-time basis paying in the $12 per hour range. Simple math indicates that over a 30-week school year such work could provide $7,200 in earnings. We conclude that wife fails to show the district court abused its discretion in determining she can earn $6,000 per year.

[3] Wife's citation and argument based on an unpublished case of this court is not persuasive. *See* Minn. Stat. § 480A.08, subd. 3(c) (2012) ("Unpublished opinions of the Court of Appeals are not precedential."); *Vlahos v. R & I Constr. of Bloomington, Inc.*, 676 N.W.2d 672, 676 n.3 (Minn. 2004) ("[W]e pause here to stress that unpublished opinions of the court of appeals are not precedential.").

2. Child support.

We turn next to wife's earning capacity and whether she should have some responsibility for child support. In important respects, this child-support issue parallels the consideration of wife's earning capacity and spousal maintenance. "[Appellate courts] will reverse a district court's order regarding child support only if we are convinced that the district court abused its broad discretion by reaching a clearly erroneous conclusion that is against logic and the facts on record." *Butt v. Schmidt*, 747 N.W.2d 566, 574 (Minn. 2008) (quotation omitted). "[A] finding of the trial court is attended with every presumption of evidentiary support. The rule applies in divorce cases the same as in others." *Loth v. Loth*, 227 Minn. 387, 392, 35 N.W.2d 542, 546 (1949).

There is a rebuttable presumption that "a parent can be gainfully employed on a full-time basis." Minn. Stat. § 518A.32, subd. 1 (2012). When a parent is voluntarily unemployed, underemployed, or employed on less than a full-time basis, child support must be calculated based on the parent's potential income. *Id.* Potential income may be determined from a parent's probable earnings level based on employment potential and occupational qualifications in light of the prevailing job opportunities and earnings level in the community. *Id.*, subd. 2(1) (2012). Whether a parent is voluntarily underemployed is a factual determination, which we review for clear error. *See Putz v. Putz*, 645 N.W.2d 343, 352 (Minn. 2002) (noting that "[t]he primary issue" on appeal was "whether the magistrate erred in finding that [husband] was not voluntarily unemployed"); *Welsh v. Welsh*, 775 N.W.2d 364, 370 (Minn. App. 2009) (applying statutory factors to determine whether a wife was voluntarily unemployed).

The statutory presumption that a parent is capable of full-time work can be rebutted if that parent shows that she is working less than full time because she qualifies as a caretaker:

> If a parent stays at home to care for a child who is subject to the child support order, the court may consider the following factors when determining whether the parent is voluntarily unemployed, underemployed, or employed on a less than full-time basis:
> (1) the parties' parenting and child care arrangements before the child support action;
> (2) the stay-at-home parent's employment history, recency of employment, earnings, and the availability of jobs within the community for an individual with the parent's qualifications;
> (3) the relationship between the employment-related expenses, including, but not limited to, child care and transportation costs required for the parent to be employed, and the income the stay-at-home parent could receive from available jobs within the community for an individual with the parent's qualifications;
> (4) the child's age and health, including whether the child is physically or mentally disabled; and
> (5) the availability of child care providers.

Minn. Stat. § 518A.32, subd. 5 (2012).

As previously discussed, here, the CSM imputed $6,000 of income to wife based on less than full-time work. Although the CSM did not discuss the caretaker exception, we construe the CSM's imputation of this modest level of income as an implicit finding that the caretaker exception does not relieve wife of any obligation to contribute to child support. *See Loth*, 227 Minn. at 392, 35 N.W.2d at 546 ("[A] finding of the trial court is attended with every presumption of evidentiary support. The rule applies in divorce cases the same as in others."). Therefore, we turn to whether the district court clearly erred in its implicit finding.

For the reasons set forth previously in upholding the earning potential for spousal maintenance, we conclude the record supports the CSM's findings that (1) wife is immediately employable in part-time employment and (2) wife has time to work due to the youngest son's 4.75 hours personal care attendant service and the approximately seven hours that he is in school each day. We conclude the district court did not abuse its discretion in its implicit rejection of the full-time caretaker exception and its conclusion that wife can earn $6,000 per year for purposes of calculating child support.

B. Wife's mortgage expense.

Husband argues that it was an abuse of discretion for the district court to include $925 per month towards a mortgage in wife's reasonable budget in the June 1, 2012, November 20, 2012, and February 11, 2013 orders.

A district court abuses its discretion by including a mortgage expense in a party's reasonable monthly budget where the party "is not currently paying [the mortgage expense]," "[t]here is no evidence in the record concerning when [the party] will begin incurring this expense," and no evidence concerning "whether [the party] ever will" begin incurring the expense. *Rask v. Rask*, 445 N.W.2d 849, 854 (Minn. App. 1989). It is not enough for a party to "merely 'estimate[]'" that a certain monthly payment "would be required to purchase the type of home [the party] wants." *Id.*

Here, at the time of all of the proceedings before the CSM and in district court, the parties still owned and wife still resided in the family residence. However, the parties intended to sell the parties' residence. Presumably wife will eventually incur housing expenses. The CSM found it would be reasonable for wife to buy a home for $300,000, with

a $200,000 down payment and a 30-year $100,000 mortgage at 4%. The CSM found $925 per month would be sufficient to service such a mortgage.

When the record for this appeal was closed, wife indicated that she was "looking at a house possibly between 200, 250,000" and that she did not know yet whether she would use any debt to purchase it. Because there is no record evidence concerning when or whether wife will begin incurring any mortgage or other housing expense, we conclude that the district court abused its discretion by including the $925 mortgage amount in wife's reasonable monthly expenses. Based on this error, we reverse the spousal maintenance awards in each of the orders on review and remand for an appropriate adjustment in those awards for the housing expense. We note that nothing in this opinion prevents wife from seeking future modification to include future reasonable mortgage expenses if and when wife actually incurs such expenses.

V. The parties' division of extracurricular activity expenses.

The next issue concerns the parties' division of extracurricular activity expenses for the youngest son. Husband argues that the CSM/district court clearly erred in the June 1 order by modifying the parties' stipulated allocation of these expenses that provided for a 50-50 split.

"Courts favor stipulations in dissolution cases as a means of simplifying and expediting litigation, and to bring resolution to what frequently has become an acrimonious relationship between the parties." *Shirk v. Shirk*, 561 N.W.2d 519, 521 (Minn. 1997). "Stipulated judgments are treated as binding contracts." *Halla Nursery, Inc. v. City of Chanhassen*, 781 N.W.2d 880, 884 (Minn. 2010). "Contract interpretation is a question of

law that we review de novo." *Caldas v. Affordable Granite & Stone, Inc.*, 820 N.W.2d 826, 832 (Minn. 2012). "We review the language of a contract to determine the intent of the parties." *Id.* "When the language of a contract is clear and unambiguous, we enforce the agreement of the parties as expressed in the contract." *Id.*

Here, the parties initially stipulated to a 50-50 split of extracurricular expenses. In its June 1, 2012 Amended Judgment and Decree, the CSM adjusted the split of extracurricular expenses to 59-41, with husband paying the 59%. Wife does not assert that she requested that the CSM adjust the parties' stipulation and does not dispute that the parties subsequently agreed on the record to maintain the 50-50 division of extracurricular expenses. Therefore, we reverse and remand for the CSM to restore the 50-50 division or to make findings supporting a rejection of the agreed-upon division and a determination for a different split based on those findings.

Husband also argues that it was error for the CSM/district court to modify extracurricular activity expenses because the modification was functionally a grant of child support in excess of the statutory guidelines without explanation. Because we reverse the modification of child support on other grounds, we do not reach this issue.

VI. Award of attorney fees.

Wife seeks over $34,000 in attorney fees, arguing that the CSM/district court abused its discretion by failing to grant need-based attorney fees and failing to grant more than $3,500 in conduct-based attorney fees.

A. Need-based attorney fees.

We review awards of attorney fees for abuse of discretion. *Lee*, 775 N.W.2d at 643 ("[A]n award of attorney fees is committed to the discretion of the district court."). A district court "shall award attorney fees, costs, and disbursements" if it finds:

> (1) that the fees are necessary for the good faith assertion of the party's rights in the proceeding and will not contribute unnecessarily to the length and expense of the proceeding;
> (2) that the party from whom fees, costs, and disbursements are sought has the means to pay them; and
> (3) that the party to whom fees, costs, and disbursements are awarded does not have the means to pay them.

Minn. Stat. § 518.14, subd. 1 (2012); *see also Holmberg v. Holmberg*, 588 N.W.2d 720, 727 (Minn. 1999) (stating that Minn. Stat. § 518.14, subd. 1 (1998), "requires the court to award attorney fees if the fees are necessary to allow a party to continue an action brought in good faith, the party from whom fees are requested has the means to pay the fees, and the party seeking fees cannot pay the fees"). A "lack of specific findings on need-based factors is not fatal" if review of the district court's order "reasonably implies that the district court considered the relevant factors and where the district court was familiar with the history of the case and had access to the parties' financial records." *Hunley v. Hunley*, 757 N.W.2d 898, 903 (Minn. App. 2008) (quotation omitted).

Here, wife seeks over $34,000 in attorney fees. The record shows wife has the means to pay her costs because she had over $300,000 in a bank account as of August 2012 and was expecting to receive over $200,000 from the anticipated sale of the family home. Under these circumstances, the CSM/district court did not abuse its discretion by denying need-based attorney fees.

B. Conduct-based attorney fees.

A district court may, "in its discretion," award "additional fees, costs, and disbursements 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 attorney fees is reviewed for an abuse of discretion." *Brodsky v. Brodsky*, 733 N.W.2d 471, 476 (Minn. App. 2007). The party moving for conduct-based attorney fees must establish that the adverse party's conduct justifies such an award. *Geske v. Marcolina*, 624 N.W.2d 813, 818 (Minn. App. 2001). The district court must make sufficient findings to show that an award of attorney fees is supported by the appropriate law and facts in the record. *See Haefele v. Haefele*, 621 N.W.2d 758, 767 (Minn. App. 2001) ("The district court did not make findings sufficient to show what combination of need or conduct support all, or different parts of, the entire award. This precludes effective review. . . . Under these circumstances, we remand the issue of attorney fees to the district court."), *review denied* (Minn. Feb. 21, 2001).

Wife states that husband's "untimely disclosure" of facts related to three positions in which he became employed during these proceedings significantly increased the length and expense of the litigation. The CSM agreed, stating that (1) the delay in disclosure resulted in a "loss of . . . retroactivity" as wife lost the opportunity to modify child support for over a month; (2) the delay in disclosure of husband's Lexis job required two hearings where one would have been sufficient; and (3) husband's unreasonable positions supported an award of $3,500 in conduct-based attorney fees.

Wife was aware of husband's October 2011 job as of October 10; wife nevertheless waited until November 18, 2011, to request the CSM set child support and spousal maintenance. It appears that only one week of delay is attributable to husband. Further, the requirement that husband disclose new employment was no longer in effect when Lexis hired husband in 2012. Under these circumstances, we conclude that the district court's grant of only $3,500 in conduct-based attorney fees is not an abuse of discretion. However, we recognize that our reversal and modification of parts of the CSM's decisions may alter the considerations on which the award of conduct-based attorney fees were based. Accordingly, we allow the CSM to consider the adequacy of such fees on remand.

VII. Conclusion.

In sum, we affirm including husband's one-time bonus and future bonuses as a basis for increased maintenance obligations. We affirm wife's ability to earn $6,000 for the purposes of calculating both spousal maintenance and child support. We affirm the denial of need-based attorney fees.

We reverse and remand the retroactive maintenance and support in the June 1, 2012 order. We reverse and remand the insurance mandate in the November 20, 2012 order. We reverse and remand the division of extracurricular expenses in the June 1, 2012, and November 20, 2012 orders. We reverse the disregard of TEFRA obligations from husband's income determination, and we reverse and remand the maintenance and support awards in the June 1, 2012, November 20, 2012, and February 11, 2013 orders based on considerations set forth in this opinion. We remand the grant of $3,500 in conduct-based

attorney fees. We do not reach certain issues as set forth in this opinion. The CSM may reopen the record consistent with this opinion.

Affirmed in part, reversed in part, and remanded.