19CA1639 Marriage of Hills 12-10-2020

COLORADO COURT OF APPEALS

Court of Appeals No. 19CA1639
City and County of Denver District Court No. 17DR30117
Honorable Christopher J. Baumann, Judge

In re the Marriage of

Joanne Marie Hills,

Appellee,

and

Mason Gordon Hills,

Appellant.

ORDER AFFIRMED IN PART, VACATED IN PART,
AND CASE REMANDED WITH DIRECTIONS

Division III
Opinion by JUDGE GROVE
Furman and Berger, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced December 10, 2020

Sherman & Howard LLC, Jordan M. Fox, Denver, Colorado, for Appellee

Márquez Law, Jason A. Márquez, Denver, Colorado; Gill Ledbetter LLP, Anne Whalen Gill, Castle Rock, Colorado, for Appellant

¶ 1 In this post-dissolution of marriage case involving Mason Gordon Hills (husband) and Joanne Marie Hills (wife), husband appeals from a district court's ruling on his motions to modify child support and spousal maintenance. We affirm the district court's order in part, vacate it in part, and remand the case for further proceedings.

I. Relevant Facts

¶ 2 Husband and wife married in 1997 and have three children, the oldest of whom is now emancipated. Wife petitioned for dissolution of marriage in February 2017.

¶ 3 Husband is a business executive and attorney who earned the vast majority of the family's substantial income. The sources of his income are somewhat complex. As relevant here:

(1) Husband was a partner and investment leader at Resource Capital Funds Management, LLC (RCFM), a private equity fund manager that specializes in investments in hard rock mining companies. He received a salary, business income, and distributions from RCFM.

(2) Husband also held a 2% partnership interest in RCFM-EU Holdings LP (RCFM-EU), a management company

formed in 2016 with three classes of limited partners: "Preferred Unit Partners," "Economic Unit Partners," and "Retired Economic Unit Partners." Husband was an Economic Unit Partner. The Preferred Unit Partners contributed the previous management company, valued at $61,370,000, and are first in line for RCFM-EU's cash flow. Until the Preferred Unit Partners' $61,370,000 contribution to the partnership is redeemed, Economic Unit Partners only receive distributions to cover their allocated tax liability.

(3) The parties' joint expert testified that, at the time of the permanent orders hearing, husband's 2% ownership interest in RCFM-EU was worth $200. Although the business income allocated to him could steadily increase the value of his ownership interest in RCFM-EU, the joint expert opined that the large buyout amount owed to the Preferred Unit Partners made it unlikely that he would receive cash distributions in the foreseeable future.

(4) For the purposes of determining child support and maintenance, the parties stipulated that husband's

"gross monthly income" would consist only of his salary of $85,417 per month.

¶ 4 As part of the dissolution decree, the district court issued written permanent orders in March 2018. The court (1) awarded the entire marital interest in RCFM-EU to husband; (2) approved the parties' agreement that M.M.H., the eldest of the parties' three children, would not be on a fixed parenting time schedule because she was attending college at that time; (3) required husband to pay monthly child support for all three children; and (4) ordered husband to pay wife monthly maintenance in the amount of $25,000 for the first three years, after which maintenance would be gradually reduced. Neither party appealed the permanent orders.

¶ 5 On August 23, 2018, husband moved to modify his child support obligation, asserting that M.M.H. emancipated in April 2018 and had been living at college since August 2017. The district court denied the motion and ordered the parties to exchange financial information and then confer to see if they could come to an agreement. If they were unable to agree, the parties were ordered to mediate the dispute. Husband did not appeal the court's order.

¶ 6 On January 14, 2019, husband again filed a motion to modify child support along with a separate motion to modify maintenance. He primarily alleged that a 30% drop in his salary and M.M.H.'s emancipation established a change in circumstances warranting downward modifications.

¶ 7 In March 2019, the district court held a hearing on the motions to modify child support and maintenance. Following the hearing, the court first found that husband's base salary had decreased since the permanent orders. It then found that in 2017 and 2018, for tax purposes, husband had reported total combined monthly incomes of $108,054 and $102,735, respectively. Both figures were considerably more than the parties' stipulated monthly amount of $85,417 at permanent orders. The court explained that husband was receiving additional income from other sources, such as "capital gains, distributions, and cash payments." For example, in 2017, RCFM-EU allocated to husband business income of $154,325 and also distributed $69,665 to compensate him for any tax liability arising from that allocation. In 2018, he was allocated business income of $319,987 and received a tax distribution of $139,896.

¶ 8 The district court accepted that husband's monthly base salary had dropped to $58,334. But the court found that husband's RCFM-EU allocations and tax distributions more than made up for that reduction. And, emphasizing that husband had failed to show that these additional sources of income would be cut off in the future, it concluded that the stipulated monthly salary of $85,417 was still a fair approximation of his gross monthly income. So, finding that husband had not established that he had experienced a substantial and continuing change in financial circumstances, the court denied modification based on husband's reduced salary.

¶ 9 The district court did grant husband's motion to modify child support, but only based on M.M.H.'s emancipation (and not her move to college). The modified support order was retroactively applied to January 14, 2019, the date husband filed his second motion to modify.

¶ 10 After the district court denied his post-trial motion, husband appealed.

II. Modification of Child Support

A. Standard of Review

¶ 11 We review a district court's decision to grant or deny a modification of child support for an abuse of discretion. *In re Marriage of Tooker*, 2019 COA 83, ¶ 12. The court abuses its discretion when its decision is manifestly arbitrary, unreasonable, or unfair. *See In re Marriage of Atencio*, 47 P.3d 718, 720 (Colo. App. 2002). But we review de novo whether the court applied the correct legal standard. *In re Marriage of Boettcher*, 2019 CO 81, ¶ 12.

B. Discussion

1. Husband's Income

¶ 12 Husband contends that the district court erred by counting his business income allocations and tax distributions from RCFM-EU toward his estimated gross income. He argues that both sources should have been excluded from his gross income because they did not provide him with additional funds to pay child support. Because we conclude that clarification is necessary as to the business income allocations, we vacate that portion of the order,

but we reject husband's argument as it relates to the direct tax distributions.

a. Law of the Case

¶ 13 At the threshold, husband claims that the question whether to consider only his salary in future child support modification proceedings was already decided at permanent orders and that the law of the case doctrine precluded re-examination of the issue. We disagree.

¶ 14 The law of the case doctrine recognizes that prior relevant rulings made in the same case should generally be followed. *S. Cross Ranches, LLC v. JBC Agric. Mgmt., LLC*, 2019 COA 58, ¶ 40. Application of the doctrine, however, is discretionary. *In re Marriage of Burford*, 26 P.3d 550, 554 (Colo. App. 2001); *see also In re Bass*, 142 P.3d 1259, 1263 (Colo. 2006) (noting that courts have "never . . . held that the 'law of the case' doctrine prevents a [district] court from clarifying or even revisiting its prior rulings"). And, in any event, the law of the case applies only to a court's decisions of law and not to its resolution of factual questions. *In re Marriage of Dunkle*, 194 P.3d 462, 467 (Colo. App. 2008).

¶ 15 Thus, even if we were to accept the doubtful proposition that the district court's acceptance of the parties' stipulation as to husband's income amounted to a ruling on an issue of law, nothing in the law of the case doctrine would have prevented the district court from revisiting that issue. And, in any event, doing so is entirely appropriate here, where the court in its discretion must determine whether modifying child support is appropriate based on the parents' *current* financial circumstances. *See* § 14-10-122(1)(b), C.R.S. 2020.

¶ 16 We likewise reject husband's related argument that the parties' stipulation regarding his income was binding on the district court absent a finding of unconscionability. As we have already noted, the permanent orders did not purport to limit future child support modification proceedings. And, assuming the parties did stipulate to limitations on child support, the court did not have to follow them. *See* § 14-10-112(2), (6), C.R.S. 2020. This is so because the right to support belongs to the child and not the parents. *See Samuel J. Stoorman & Assocs., P.C. v. Dixon*, 2017 CO 42, ¶ 12; *see also In re Marriage of Kann*, 2017 COA 94, ¶ 22.

b. Allocations From RCFM-EU

¶ 17 RCFM-EU is a limited partnership that, for income tax purposes, allocates business income and tax liabilities from the business of RCFM on a pass-through basis. Pass-through income is not distributed to the limited partners, but it does count as income under the Internal Revenue Code, and thus appears on the partner's tax returns. Allocations of this type — for which the recipient does not receive money but does get a larger tax bill — are often called "phantom income." *See* Timothy M. Todd, *Phantom Income and Domestic Support Obligations*, 67 Buff. L. Rev. 365, 376-77 (2019) ("The term *phantom income* is used colloquially when a taxpayer receives taxable income but does not presently receive cash or other tangible economic benefits.").

¶ 18 Husband receives a substantial amount of phantom income from RCFM-EU, totaling more than $450,000 in 2017 and 2018 combined. As a result, despite the 30% drop in his RCFM salary, husband's taxable income actually increased during those years.[1]

[1] The tax distributions that husband received from RCFM-EU, which we address below, also contributed to the increase in husband's taxable income.

This increase in taxable income was at the heart of the district court's ruling. Because "[g]ross income" means "income from any source," § 14-10-114(8)(a)(II), (c)(1), C.R.S. 2020, the court concluded that it could not "simply look to Husband's base salary *or* the change in Husband's base salary to resolve this dispute." Instead, the court relied on the adjusted gross income reported on husband's tax returns — which included not only his base salary but also the allocations from RCFM-EU (i.e., the phantom income) and the RCFM-EU tax distributions — to determine that husband's base salary did not necessarily reflect his financial situation. More specifically, the court found that husband's "financial circumstances in 2017 and 2018 were better than the stipulated income suggests and, therefore, a decrease in [h]usband's base salary in 2019 does not lead to the inevitable conclusion that his [current] financial circumstances are so different as to be considered substantial and continuing."

¶ 19 There is record support for the district court's conclusion that husband's base salary "was not a precise indicator of his financial resources or reality." But what is not clear from the record is the extent to which the district court relied on husband's phantom

income — or, more importantly, the extent to which it concluded that it *had to* rely on that phantom income — to reach this conclusion. This matters for two reasons. First, "[t]he determination of a parent's gross income for child support purposes is not controlled by definitions of gross income used for federal or state income tax purposes." *In re Marriage of Cardona*, 321 P.3d 518, 526 (Colo. App. 2010), *aff'd on other grounds*, 2014 CO 3; *see also In re Marriage of Fain*, 794 P.2d 1086, 1087 (Colo. App. 1990). And second, despite the fact that "gross income" is "income from any source," § 14-10-114(8)(a)(II), (c)(1), Colorado's child support guidelines provide that income from limited partnerships like RCFM-EU may be excluded under certain circumstances. In particular, "if a parent is a passive investor, has a minority interest in the company, and does not have any managerial duties or input, then the income to be recognized may be limited to actual cash distributions received." § 14-10-115(5)(a)(I)(W), C.R.S. 2020. As a 2% owner of RCFM-EU, husband has no control over the partnership's management or distributions, and he is locked out of receiving anything more than a tax bill (and a distribution to offset that bill, which we address below) unless and until the Preferred

Unit Partners' investment pays out. Accordingly, this subsection likely accounts for phantom income like the allocations that husband receives from RCFM-EU.

¶ 20 Section 14-10-115(5)(a)(I)(W), however, is phrased permissively; it provides that "the income to be recognized *may* be limited to actual cash distributions received." (Emphasis added.) Accordingly, had the district court acknowledged the nature of husband's RCFM-EU allocations, and after considering all of the relevant circumstances, decided that the inclusion of the phantom income nevertheless was appropriate, that exercise of discretion arguably would have been proper. But we are unable to discern from the record before us whether the district court did so. It did not cite section 14-10-115(5)(a)(I)(W) in its order, and, as we have already noted, its conclusion that husband's financial circumstances were substantially unchanged appears to have been based solely on husband's tax returns. *See In re Marriage of Cardona*, 321 P.3d at 526.

¶ 21 We are thus left with two possibilities. Either the district court (without mentioning the statute) recognized that husband's phantom income could be excluded under section 14-10-

115(5)(a)(I)(W) and chose not to do so as a matter of discretion, or the court did not apply the statute and, as a result, failed to exercise the discretion that the statute contemplates. Because we cannot discern the basis for the inclusion of husband's phantom income, we vacate this portion of the order and remand the case to ensure an appropriate exercise of that discretion.

¶ 22 On remand, the district court should clarify whether its inclusion of husband's phantom income was an exercise of its discretion under section 14-10-115(5)(a)(I)(W) or whether it included those amounts because they were part of the adjusted gross income reported on husband's tax returns. If the phantom income was included simply because it was part of husband's adjusted gross income, the court should reconsider its prior disposition in light of section 14-10-115(5)(a)(I)(W) and decide, in its discretion, whether it is appropriate to include husband's phantom income when evaluating his financial situation for the purposes of maintenance and child support. But if the district court's order took section 14-10-115(5)(a)(I)(W) into account, the court should make clear that its inclusion of husband's phantom income was an exercise of its discretion under that statute.

¶ 23 In the event that the court determines that husband's phantom income should be excluded, it should recalculate child support accordingly.

c. Tax Distributions From RCFM-EU

¶ 24 We turn next to the district court's inclusion of husband's tax distributions from RCFM-EU in its calculation of his gross income. The district court included these amounts, which RCFM-EU paid directly to husband to satisfy any tax liabilities arising from his allocated business income, in its calculation of husband's gross income. The court found, among other things, that husband used the distributions on several occasions to cover certain financial obligations, such as wife's maintenance payments and mortgages on rental properties in Australia.

¶ 25 Husband contends that these tax distributions were essentially unavailable to him because, by the time he received the payments, they were in effect already spoken for by the relevant taxing authorities. Irrespective of the eventual destination of these funds, however, section 14-10-115(5)(a)(I)(W), is dispositive of his argument. While the statute's permissive phrasing gave the district court discretion to include or exclude husband's phantom income,

it goes on to state that "the income to be recognized may be limited to actual cash distributions received." *Id.* Thus, husband's tax distributions, which came in the form of direct payments to him from RCFM-EU, qualified as income under section 14-10-115(5)(a)(I)(W), and the district court appropriately included those distributions in its calculation of his gross income.

¶ 26 In any event, even if the statute were not dispositive, a division of this court rejected a similar argument in *In re Marriage of Stress*, 939 P.2d 500 (Colo. App. 1997). In that case, the father's employer transferred him to Canada and, in his final paycheck of each year, paid him a lump sum — and then deducted the same amount — for his Canadian income taxes. *Id.* at 501. The father maintained that the tax payment was "phantom income" and was not reasonably available to him for child support payments. *Id.* at 502. Noting that the company's subtraction of the lump-sum payment was no different from incremental withholding of taxes by domestic employers, the division held that the tax payment was properly included in his gross income because it "constituted a lump-sum addition to salary to offset a lump-sum withholding tax." *Id.*

¶ 27 We perceive no reason to depart from the holding in *Stress*, particularly in light of the fact that the tax distributions from RCFM-EU were sent directly to husband and could be used — at least before tax season — for everyday expenses. Moreover, while we acknowledge that money is fungible, we find it significant that husband recalled spending portions of his distributions on certain financial obligations and, at the time of the 2019 modification hearing, had not applied his 2017 and 2018 distributions toward his tax liabilities.

2. Effective Date of Modified Child Support

¶ 28 On the basis of M.M.H.'s emancipation alone, the district court modified child support retroactive to January 14, 2019, the date husband filed his second motion to modify. Husband contends that the court erred by failing to retroactively modify child support to any of the following dates: (1) August 2017, when M.M.H. moved away to attend college; (2) April 24, 2018, when the child emancipated; or (3) August 23, 2018, when he filed his first motion to modify. We are not persuaded.

a. August 2017

¶ 29 Child support may be modified only as to installments accruing subsequent to the filing of the motion. § 14-10-122(1)(a), (d). But when a "mutually agreed upon change of physical care occurs," child support is modified as of the date of the change in care, rather than as of the date the motion to modify is filed. § 14-10-122(5).

¶ 30 We acknowledge that M.M.H. left the parties' respective residences in August 2017 to attend college. But there was no mutually agreed upon change in the child's physical care under section 14-10-122(5). In other words, the parties did not agree that the child's transition led to a change in her physical care arrangement. *See* § 14-10-115(1)(b)(III); *see also In re Marriage of Garrett*, 2018 COA 154, ¶ 28. Rather, the parties merely agreed that the child would not be on a fixed parenting time schedule.

¶ 31 We observe that M.M.H. was already attending college before the district court issued its written permanent orders in March 2018. This event was considered by the court when setting the initial child support order, and husband did not appeal the order.

¶ 32 Therefore, the district court did not err in deciding against modifying child support retroactive to August 2017. *See* § 14-10-122(1)(a), (d).

b. April 2018

¶ 33 For child support orders entered on or after July 1, 1997, a child becomes emancipated at the age of nineteen. § 14-10-115(13)(a). *When the last or only child* emancipates, child support terminates without either parent having to file a motion to modify. *Id.* (emphasis added).

¶ 34 M.M.H. emancipated on April 24, 2018. Because M.M.H. was not the parties' only child and was the first to emancipate, husband was required to seek modification, if he wanted it, at that time. *See In re Marriage of Schmedeman*, 190 P.3d 788, 792 (Colo. App. 2008) (emancipation of older child does not automatically result in a modification of support unless a motion to modify is filed). As a result, the district court did not err in this regard. *See* § 14-10-122(1)(a), (d).

c. August 2018

¶ 35 On August 23, 2018, husband filed his first motion to modify child support, which the court denied. In its denial, the court did

not order, nor did husband ask, that any modification of child support be retroactive to that date. Equally important, husband did not appeal the order. So, the district court did not err in retroactively modifying child support only to January 14, 2019, instead of August 23, 2018. *See id.*

¶ 36 In all, the district court correctly determined that it had authority only to order retroactive child support to the date of the second modification motion. *See id.*

III. Maintenance Modification

¶ 37 For the same reasons, husband asserts that the district court erred in not honoring the parties' prior stipulation at permanent orders regarding his gross monthly income for purposes of modifying maintenance. We reject the assertion because we adopt and incorporate our previous analysis of law of the case and unconscionability here.

¶ 38 Husband also maintains that the district court erred in denying his motion to modify maintenance because it wrongly calculated his gross income. Because determining gross income for the purposes of both maintenance and child support is identical,

meaning that section 14-10-114(8)(c)(I) mirrors section 14-10-115(5)(a)(I), we need not address those matters again here.

¶ 39 Accordingly, with respect to the business income allocations from RCFM-EU, in the event that the court determines that husband's phantom income should be excluded, it should recalculate maintenance accordingly.

IV. Appellate Attorney Fees

A. Section 13-17-102

¶ 40 Wife asks for her appellate attorney fees because parts of husband's appeal are frivolous under section 13-17-102, C.R.S. 2020. Because we disagree with her assertion that husband raised frivolous arguments, we decline to award fees under section 13-17-102.

B. Section 14-10-119

¶ 41 Arguing that their incomes are disparate, the parties request their appellate attorney fees under section 14-10-119, C.R.S. 2020. Because the district court is better equipped to resolve the factual issues as to their current financial resources, it should consider their request on remand. *See* C.A.R. 39.1; *see also Kann*, ¶ 84.

V. Conclusion and Remand Instructions

¶ 42 We vacate the child support and maintenance portions of the order regarding husband's business income allocations from RCFM-EU and remand for the district court to determine in its discretion whether, under section 14-10-115(5)(a)(I)(W), those amounts should be included in husband's gross income. We also remand for resolution of the parties' requests for appellate attorney fees under section 14-10-119. In all other respects, the order is affirmed.

JUDGE FURMAN and JUDGE BERGER concur.