

20CA1702 Marriage of Kjerstad 10-21-2021

COLORADO COURT OF APPEALS

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Court of Appeals No. 20CA1702  
Douglas County District Court No. 11DR1676  
Honorable Andrew C. Baum, Judge

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In re the Marriage of

Rick N. Kjerstad,

Appellant,

and

Gianna R. Kjerstad,

Appellee.

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ORDER AFFIRMED

Division IV  
Opinion by JUDGE TOW  
J. Jones and Freyre, JJ., concur

**NOT PUBLISHED PURSUANT TO C.A.R. 35(e)**  
Announced October 21, 2021

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Beck, Jonson & Nolan, P.C., Nicholas D. Jonson, Lakewood, Colorado, for  
Appellant

WZW Family Law, LLC, Carolyn Witkus, Emily Warren, Erin A. Penrod, Denver,  
Colorado, for Appellee

¶ 1 In this post-dissolution proceeding, Rick N. Kjerstad (husband) appeals the district court's order adopting a magistrate's decision denying his motion to modify his spousal maintenance obligation. We affirm.

## I. Background

¶ 2 Husband and Gianna R. Kjerstad (wife) were married for twenty-one years. On February 21, 2013, the district court issued a decree dissolving the marriage. As part of the decree, the court approved and adopted the parties' separation agreement, which provided in relevant part that husband would pay wife modifiable maintenance of \$15,000 per month.

¶ 3 On March 21, 2019, husband moved to modify or terminate his maintenance obligation to reflect his current income. Husband subsequently filed two sworn financial statements, one on April 24, 2019, and the other on February 24, 2020. In his first sworn financial statement, husband indicated that he was working in sales for Paladina Health earning \$20,833 per month and that the total value of all assets he owned was \$508,371. In the second, he represented that his total monthly gross income was \$13,081 and the total value of all his assets was \$569,363.

¶ 4 Following a hearing, the magistrate issued a written order denying husband's motion. Husband petitioned for review, and the district court adopted the magistrate's order.

¶ 5 Husband now appeals.

## II. Standard of Review

¶ 6 Our review of a district court's order adopting a magistrate's decision is effectively a second layer of appellate review. *In re Marriage of Young*, 2021 COA 96, ¶ 8. We review the magistrate's and the court's conclusions of law de novo but defer to their factual findings unless they are clearly erroneous. *In re Marriage of Thorstad*, 2019 COA 13, ¶ 26. A factual finding is clearly erroneous when there is no support for it in the record. *Young*, ¶ 8.

¶ 7 We review an order denying a modification of maintenance for an abuse of discretion. *Id.* at ¶ 7. A district court abuses its discretion when its decision is manifestly arbitrary, unreasonable, or unfair, or is based on a misapplication of the law. *Id.*

## III. Modification of Maintenance

¶ 8 Under section 14-10-122(1)(a), C.R.S. 2020, maintenance may be modified only upon a showing of changed circumstances so substantial and continuing as to make the existing terms unfair. *In*

*re Marriage of Tooker*, 2019 COA 83, ¶ 35. In making the threshold determination of whether the parties' changed circumstances justify modification, the district court must examine all the circumstances pertinent to awarding maintenance under the statute. *Thorstad*, ¶¶ 2, 42; *In re Marriage of Nelson*, 2012 COA 205, ¶ 26.

¶ 9 But when, as in this case, the dissolution petition seeking maintenance was filed before January 1, 2014, the former version of section 14-10-114 governs. See § 14-10-114(9), C.R.S. 2020; see also *Thorstad*, ¶ 12; *In re Marriage of Vittetoe*, 2016 COA 71, ¶ 8 (“The General Assembly repealed and reenacted the maintenance statute, section 14-10-114 — effective January 1, 2014 — determining that courts and litigants would benefit from ‘a more detailed statutory framework that includes advisory guidelines to be considered as a starting point for the determination of fair and equitable maintenance awards.’”) (citation omitted). Thus, the new provisions requiring the court to make specific findings are not applicable. See § 14-10-114(3)(a)(I)(A), (8); cf. *In re Marriage of Yates*, 148 P.3d 304, 313 (Colo. App. 2006) (“The court need not make explicit findings regarding the criteria for eligibility for maintenance.”).

¶ 10 Under the former version of the statute, the district court, before awarding maintenance, must determine that the spouse seeking it lacks sufficient property to provide for her reasonable needs and is unable to support herself through appropriate employment. § 14-10-114(3), C.R.S. 2013. Once that threshold finding is made, the court may order maintenance after considering all relevant factors, including

(a) The financial resources of the party seeking maintenance, including marital property apportioned to such party, and the party's ability to meet his or her needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party;

(b) The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment and that party's future earning capacity;

(c) The standard of living established during the marriage;

(d) The duration of the marriage;

(e) The age and the physical and emotional condition of the spouse seeking maintenance; and

(f) The ability of the spouse from whom maintenance is sought to meet his or her

needs while meeting those of the spouse seeking maintenance.

§ 14-10-114(4), C.R.S. 2013.

¶ 11 After determining whether there has been a change in the parties' circumstances, the district court turns to whether, as a result of this change, the maintenance award has become unfair. § 14-10-122(1). At this stage, however, the inquiry is not governed by "the same standard as an original award, for to do so would give no real meaning to § 14-10-122 and would result in the filing of motions to modify each time there is any change in the earning ability or needs of a party." *Aldinger v. Aldinger*, 813 P.2d 836, 840 (Colo. App. 1991). Thus, the question in such a case is "not whether, based on the current financial circumstances of the parties, the court would have ordered the same amount of support. Instead, the question is different: Have the terms of the original award become unfair, *i.e.*, unconscionable." *Id.*

¶ 12 The party seeking modification bears a heavy burden of proof. *In re Marriage of Ward*, 740 P.2d 18, 20 (Colo. 1987); *see also In re Marriage of Udis*, 780 P.2d 499, 503 (Colo. 1989) (noting that a heavy burden is appropriate when the original maintenance award

was based on the parties' agreement, which "frequently reflects compromises and adjustments by both parties in their positions regarding other matters").

#### IV. Analysis

¶ 13 Although husband fashions his appeal as presenting five separate issues, we read the challenge to be several arguments underlying a single overriding contention: that the magistrate erred by deciding that no substantial and continuing change of circumstances had occurred that rendered the original maintenance terms unfair. His specific challenges are that the magistrate erroneously (1) failed to consider husband's income — and, in fact, failed to make a specific finding as to what husband's income was; (2) failed to consider that husband had been required to liquidate assets that had been awarded to him in the divorce; (3) found that husband's assets had not been depleted; (4) found husband not credible; (5) failed to make sufficient factual findings; and (6) declined to find that wife was voluntarily underemployed. We disagree with each of his contentions.

### A. Husband's Income

¶ 14 Husband first argues that the magistrate “failed completely to consider [h]usband’s income.” We disagree.

¶ 15 Per the dissolution decree, husband agreed, based on his monthly income of \$45,000, to pay wife monthly maintenance in the amount of \$15,000. At the modification hearing, husband asserted, in line with the opinion of his expert, that his total current monthly income at Paladina Health had been reduced to \$13,416. Husband arrived at that sum by adding together his salary of \$12,500 per month, his future commissions earned in the amount of \$416 per month, plus dividend income of \$500 per month.

¶ 16 For her part, wife argued, supported by her expert, that husband’s total current monthly income was significantly higher than what he claimed. Relying on Paladina Health’s offer letter, wife’s expert projected his total monthly income to be \$31,750, based on his salary of \$12,500 per month, target commissions of \$18,750 per month, and dividend income of \$500 per month. When asked why it was appropriate to include husband’s target commissions as referenced in the offer letter, the expert answered,



Because that's what [Paladina Health] expects him to perform, and if he doesn't perform to that level, he may . . . not be around. Well, he's still around. I . . . think it's a reasonable way of concluding what . . . the long-term income for [husband] is.

And the expert indicated that husband's maintenance obligation represents 47% of his gross monthly income of \$31,750 and 44% of his taxable net income, with maintenance being deductible.

¶ 17 Ultimately, the magistrate found wife's evidence more persuasive and found that husband's income had not decreased enough to warrant a modification of maintenance. True, the magistrate did not make a specific finding as to what husband's income was. But it may be fairly inferred from the order that the magistrate accepted wife's expert's testimony on this issue. In any event, it was sufficient when making the threshold inquiry of whether husband had demonstrated a change in circumstances that the court merely rejected husband's claim as to the severity of his income reduction. See *In re Marriage of Bowles*, 916 P.2d 615, 618 (Colo. App. 1995) (“[M]ere increases or decreases in earnings do not require the conclusion that the amount of maintenance has become unconscionable . . . .”).

¶ 18 There is record support for the magistrate’s finding that husband had failed to demonstrate a continuing change in circumstances. Similarly, there is record support for the magistrate’s implicit finding that any decrease in husband’s income was not sufficiently substantial to warrant modification of the maintenance. Because the findings were not clearly erroneous, we will not disturb them.

B. Payment of Maintenance from Former Marital Assets

¶ 19 Husband also contends that the magistrate failed to consider that husband had been required to liquidate assets that had been awarded to him in the divorce. But the clear language of the magistrate’s order belies this argument.

¶ 20 The magistrate explicitly noted husband’s testimony that he had to sell the home he had received in the property division to satisfy a maintenance arrearage, and that he “has to pay maintenance out of the money market account . . . .” Thus, it cannot be said that the magistrate did not consider this evidence. *See Udis*, 780 P.2d at 504 (appellate court may presume that the district court considered all the competent evidence before it); *see*

also *In re Marriage of Boettcher*, 2018 COA 34, ¶ 25, *aff'd*, 2019 CO 81.

¶ 21 Instead, the magistrate apparently was not sufficiently swayed by this evidence to deem it dispositive of the overall issue of whether husband had demonstrated a continuing change of circumstances rendering the original maintenance award unfair. The weight given to the evidence is exclusively in the province of the trial court. *In re Marriage of Blake*, 807 P.2d 1211, 1213 (Colo. App. 1990).

¶ 22 We will not disturb a trial court's resolution of conflicting evidence merely because the record would support a contrary finding. *Bowles*, 916 P.2d at 617. Again, there is record support for the magistrate's finding, and we thus discern no basis for reversal on this point.

### C. Depletion of Assets

¶ 23 Husband challenges the following italicized language contained in the magistrate's order:

If [husband] truly had a deficit of \$5,439 per month in 2019 [as reflected in his April 24, 2019, sworn financial statement] and \$10,689 per month in 2020 [as reflected in his February 20, 2020, statement], his assets

would have been depleted by \$86,646 since the filing of his April 2019 [s]worn [f]inancial [a]ffidavit. That has not occurred. *Despite [husband's] claims that his assets are being depleted, the evidence is to the contrary.*

(Emphasis added.) The crux of his argument is that the magistrate improperly focused on the time period between April 24, 2019 (when he filed his first sworn financial statement) and February 24, 2020 (when he filed his second sworn financial statement) in determining whether circumstances had changed justifying a modification instead of the entire period between February 21, 2013 (when the district court entered the dissolution decree) and March 5, 2020 (when the magistrate held the modification hearing). He then points to evidence that he liquidated several assets since the dissolution to meet his maintenance obligation. We are not persuaded.

¶ 24 When read in context, the magistrate simply illustrated that between the time husband filed his first sworn financial statement and the time he filed his second, his assets had in fact increased. We do not read the challenged statement as broadly as husband does — as saying that his assets had not been depleted since the entry of the dissolution decree. To be sure, as noted above, the

magistrate expressly considered husband's testimony that, to satisfy his maintenance obligation since the dissolution, husband sold real property in 2015 and took money from his money market account. The magistrate also considered his employment history and income from 1997 to the present.

¶ 25 More to the point, husband's own sworn financial statements provide ample record support for the challenged statement. Husband conceded in his opening brief that his assets did in fact increase during the relevant time period. Because the record supports the magistrate's finding that husband's assets had not been depleted during the relevant time period, we decline to disturb it. *See Young*, ¶ 8.

#### D. Husband's Credibility

¶ 26 Husband next asserts that the magistrate erred by finding him not credible. But the "[e]valuation of the credibility of witnesses . . . is a matter solely within the fact finding province of the trial court, and we will not reweigh testimony or reevaluate evidence on appeal." *In re Estate of Romero*, 126 P.3d 228, 231 (Colo. App. 2005). The trial court's credibility determinations "are insulated from appellate review because the trial judge has a unique

opportunity to observe witnesses and to assess their credibility.”

*Moeller v. Colo. Real Est. Comm’n*, 759 P.2d 697, 702 (Colo. 1988).

#### E. Sufficiency of the Magistrate’s Findings

¶ 27 Husband argues that the magistrate’s factual findings were insufficient. Again, we disagree.

¶ 28 The magistrate made detailed findings, including credibility determinations, regarding husband’s (1) past and present employment history; (2) reduced salary since the entry of the dissolution decree; (3) liquidation of certain assets, awarded to him in the dissolution, to pay maintenance; (4) current assets, which totaled \$950,363; and (5) current monthly expenses. The magistrate further found that husband’s reduced income was still enough to pay his maintenance obligation and keep his accustomed lifestyle. In contrast, the magistrate found that wife could not support herself without maintenance. The record supports the magistrate’s findings.

¶ 29 The magistrate discussed the testimony of the witnesses in great detail, noted the discrepancies in the experts’ opinions, observed the conflicting commission information received by wife’s

expert, and in the end found the testimony of wife's expert to be more credible than husband.

¶ 30 The magistrate also made findings regarding husband's ability to pay maintenance and wife's continued need for it. The record reflects that even with his maintenance obligation, husband can pay his mortgage and credit cards in full every month and contribute to his retirement accounts on a monthly basis. According to his sworn financial statements and as husband conceded in his petition for district court review, husband's assets increased in value from the time he filed his modification motion to the hearing date. The magistrate further noted that husband omitted from his second sworn financial statement \$381,000 of equity in his residence. The magistrate also found that wife was a part-time Pilates instructor, had a struggling Pilates business, and could not support herself without maintenance.

¶ 31 These ample findings are more than sufficient to permit us to review the magistrate's decision. *See In re Marriage of Rozzi*, 190 P.3d 815, 822 (Colo. App. 2008) ("A [district] court's order must contain findings of fact and conclusions of law sufficiently explicit to give an appellate court a clear understanding of the basis of its

order and to enable the appellate court to determine the grounds upon which it rendered its decision.”). And to the extent that this contention encompasses a general attack on the sufficiency of the record support for these findings, we reject that argument as well. There is ample record support for the magistrate’s findings.

#### F. Wife’s Employment Status

¶ 32 Finally, husband maintains that the magistrate erred by not finding wife to be voluntarily underemployed. Again, we disagree.

¶ 33 Initially, we reject wife’s argument that husband did not preserve this contention because he did not raise the issue before the magistrate. Husband identified this as an issue for the hearing in the joint trial management certificate. While cross-examining wife, husband’s counsel asked extensively about wife’s lack of income, her inaction related to “refreshing” her education, and the fact that she had been purportedly developing a Pilates business for five years — inquiries clearly seeking to lay the foundation for a voluntary underemployment argument. Finally, husband raised the issue in his petition for district court review, and the district court ruled on it. *See Berra v. Springer & Steinberg, P.C.*, 251 P.3d 567, 570 (Colo. App. 2010) (to preserve an issue for appeal, the issue



must be brought to the district court’s attention so that the court is given an opportunity to rule on it). Husband has preserved this issue for review.

¶ 34 Turning to the merits of husband’s claim, we are aware of no published appellate decision that holds that a court may consider whether a spouse who receives maintenance is voluntarily underemployed when considering whether the spouse who must pay maintenance has established a change in circumstances warranting a modification of maintenance. *Contra In re Marriage of Swing*, 194 P.3d 498, 500 (Colo. App. 2008) (“A court may consider whether an *obligor* spouse is voluntarily underemployed in determining whether reduced income is a substantial and continuing circumstance that would justify modification or termination of his maintenance obligation.”) (emphasis added).

¶ 35 The closest authority husband cites is the following dictum — which husband incorrectly characterizes as a holding — from the opinion in *Swing*: “A similar analysis would apply if an obligee spouse took early retirement and sought to increase maintenance on this basis.” *Id.* at 501. But even assuming the dictum is a correct statement of the law (a point on which we express no

opinion), it would not assist husband. In the hypothetical scenario posed in *Swing*, the spouse receiving maintenance retires, *creating* the change in circumstances on which that spouse then relies to increase the other spouse's maintenance obligation.

¶ 36 But in this case, wife has done nothing to change her circumstances. Nor does she seek to increase husband's maintenance obligation. And there is nothing in the parties' original agreement that suggests that she was expected to take steps to wean herself from the need for maintenance. Thus, the *Swing* dictum is entirely inapposite. We discern no basis for reversal.

¶ 37 In sum, the magistrate's findings all have record support, and we discern no abuse of discretion in the denial of husband's motion to modify his maintenance obligation.

## V. Conclusion

¶ 38 The district court's order adopting the magistrate's order is affirmed.

JUDGE J. JONES and JUDGE FREYRE concur.