**2021 COA 96**

**In re the Marriage of Hadley Rasch Young, Appellant,**

**and**

**Kimberly Ross Young, Appellee.**

**No. 20CA1023**

**Court of Appeals of Colorado, Sixth Division**

**July 15, 2021**

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A division of the court of appeals considers whether a trial court must make express findings on the factors relevant to an initial award of spousal maintenance when the court decides a motion to modify maintenance under section 14-10-122, C.R.S. 2020. The division concludes that trial courts generally are not required to address all of those factors when ruling on a motion to modify maintenance.

Douglas County District Court No. 17DR244 Honorable Robert Lung, Judge

Griffiths Law PC, Eliza Steinberg, Christopher Griffiths, Duncan Griffiths, Lone Tree, Colorado, for Appellant

Bettenberg, Maguire & Associates, LLC, Alison A. Bettenberg, Centennial, Colorado, for Appellee

**OPINION**

BERGER, JUDGE

¶ 1 When a court orders spousal maintenance, it must make written or oral findings on a number of statutory factors. § 14-10-114(3)(a)(I), C.R.S. 2020. But must a court make express findings on all those factors when addressing a motion to modify an existing maintenance award under section 14-10-122, C.R.S. 2020? As a matter of first impression, the answer is no.

¶ 2 In this post-dissolution of marriage proceeding, Hadley Rasch Young (husband) appeals the district court's order adopting the magistrate's order, which denied husband's motion to modify his maintenance obligation to Kimberly Ross Young (wife).[1] We reject his argument that the magistrate erred by not addressing all of the factors in section 14-10-114(3)(a)(I). But we agree that some of the magistrate's findings are not supported by the record, so we reverse and remand the case for further consideration.

I. Background

¶ 3 In contemplation of their divorce, the parties entered into a memorandum of understanding in which husband agreed to pay wife $20, 000 in monthly maintenance until December 1, 2024. The parties stipulated that husband earned $70, 000 per month as a programmer and chief executive officer (CEO) of his company, Hybir, and that wife could earn $3, 000 per month. The parties agreed that the maintenance award would be modifiable as to amount but not term. Husband's uncontradicted testimony was that the parties made the amount of maintenance modifiable because his income was "variable" and that "there was some uncertainty." The district court incorporated the parties' stipulated terms into the dissolution decree.

¶ 4 Nine months later, husband moved to modify maintenance under section 14-10-122.[2] Husband argued that his income had dropped to $42, 333 per month and he could no longer afford to pay wife $20, 000. Husband wanted the court to lower his payment to $12, 000 per month for the duration of the maintenance term.

¶ 5 By the time of the February 2019 hearing on husband's motion to modify, he asserted that his income had dropped even further, to $17, 333 per month (approximately

$200, 000 annually). At the hearing, wife agreed that husband's monthly income had dropped to $17, 000. The parties again stipulated that wife could earn $3, 000 per month. Husband requested that the court award wife $5, 133 in monthly maintenance and order her to reimburse any overpayment from the date he filed his motion.

¶ 6 The magistrate denied husband's motion after finding that he had failed to meet his burden to establish a substantial and continuing change of circumstances justifying a maintenance modification. Husband sought review of the magistrate's order in the district court under C.R.M. 7(a). The district court adopted the magistrate's order.

II. Analysis

A. Standard of Review

¶ 7 We review an order denying a modification of maintenance for an abuse of discretion. *In re Marriage of Gibbs*, 2019 COA 104, ¶ 8. A court abuses its discretion if its decision is manifestly arbitrary, unreasonable, or unfair, or if the court misapplies the law. *Id.*

¶ 8 A district court must defer to a magistrate's factual findings unlessthey areclearly erroneous. C.R.M. 7(a)(9). Our review of the district court's decision is effectively a second layer of appellate review; we apply the same clearly erroneous standard to the magistrate's findings. *In re Parental Responsibilities Concerning G.E.R.*, 264 P.3d 637, 638-39 (Colo.App. 2011). A court's factual finding is clearly erroneous if there is no support for it in the record. *Gagne v. Gagne*, 2019 COA 42, ¶ 17.

¶ 9 We review questions of law de novo, including whether the court applied the proper legal standard. *In re Marriage of Thorstad*, 2019 COA 13, ¶ 27.

**B. Maintenance Modification**

¶ 10 Citing *Thorstad*, husband argues that the magistrate erred by failing to make findings under section 14-10-114(3)(a)(I). We reject this argument.

¶ 11 True, when a court grants an initial maintenance award, the court

> *shall* make initial written or oral findings concerning:
>
> (A) The amount of each party's gross income;
>
> (B) The marital property apportioned to each party;
>
> (C) The financial resources of each party, including but not limited to the actual or potential income from separate or marital property;
>
> (D) Reasonable financial need as established during the marriage; and
>
> (E)Whether maintenance awarded pursuant to this section would be deductible for federal income tax purposes by the payor and taxable income to the recipient.

§ 14-10-114(3)(a)(I) (emphasis added); *In re Marriage of Wright*, 2020 COA 11, ¶ 14.

¶ 12 But on a motion to modify maintenance under section 14-10-122, the inquiry is different. The threshold question is whether the moving party has demonstrated "changed circumstances so substantial and continuing as to make the existing terms unfair." § 14-10-122(1)(a). To decide this question, "[t]he court *may* consider the guideline amount and term of maintenance and the statutory factors set forth in subsection (3) of this section." § 14-10-114(5) (emphasis added). The party seeking modification bears a heavy burden of proving that the provisions have become unfair under all relevant circumstances. *In re Marriage of Udis*, 780 P.2d 499, 503 (Colo. 1989).

¶ 13 In *Thorstad*, ¶ 42, a division of this court held, "[t]o determine if the parties' changed circumstances warrant modification, the court

must examine them as if it were awarding maintenance for the first time." But *Thorstad* analyzed section 14-10-114 as it existed in September 2001. *Id.* at ¶¶ 12, 41. That version of the statute did not contain subsection (5), specifically addressing modifications. *Compare* § 14-10-114, C.R.S. 2001 (the statute analyzed in *Thorstad*), *with* Ch. 176, sec 1, § 14-10-114(5), 2013 Colo. Sess. Laws 648 (amending the maintenance statute to include subsection (5) on modification), *and* § 14-10-114(5), C.R.S. 2020 (current law). *Thorstad*, therefore, did not address the current, pertinent statutory language.

¶ 14 While husband argues that the magistrate needed to make findings on every factor pertinent to an initial award of maintenance, the statutory subsection addressing modification says that a court "*may*" consider those factors. § 14-10-114(5) (emphasis added). "The word may 'is generally indicative of a grant of discretion or choice among alternatives.'" *AA Wholesale Storage, LLC v. Swinyard*, 2021 COA 46, ¶ 29 (quoting *A.S. v. People*, 2013 CO 63, ¶ 2). The absence of "mandatory language directed at the court, such as 'must,' 'shall,' or 'is required to, '" is a strong indicator that a court has discretion to choose which, if any, of the maintenance factors to address. *See Sidman v. Sidman*, 2016 COA 44, ¶ 19.

¶ 15 "We interpret 'may' as 'shall' only when the purposes underlying the rule are 'not fulfilled by a permissive construction.'" *AA Wholesale*, ¶ 29 (citation omitted). We conclude that the purposes of section 14-10-114(5) are not frustrated, but served, by the permissive construction.

¶ 16 Motions to modify are not considered under the same standard as initial awards. *See, e.g.*, *Aldinger v. Aldinger*, 813 P.2d 836, 840 (Colo.App. 1991). The issue is not whether, based on the current financial circumstances of the parties, the court would have awarded the same amount as originally awarded. *In re Marriage of Weibel*, 965 P.2d 126, 128 (Colo.App. 1998). Rather, the issue central to modification is whether the terms of the initial award have become unfair. § 14-10-122(1)(a); *In re Marriage of Tooker*, 2019 COA 83, ¶ 35. This is a much more demanding standard, which seeks to prevent "the filing of motions to modify each time there is any change in the earning ability or needs of a party." *Aldinger*, 813 P.2d at 840.

¶ 17 Our conclusion that "may" grants the trial court discretion is buttressed by the fact that other sections of the spousal maintenance statute use the restrictive "shall," including the subsection addressing an initial award of maintenance. *See* § 14-10-114(3)(a)(I). "Where both mandatory and directory verbs are used in the same statute . . . the verbs should carry with them their ordinary meanings." *A.S.*, ¶ 21 (quoting 3 Norman J. Singer & J.D. Shambie Singer, Sutherland Statutory Construction § 57:11 (7th ed.)). We therefore conclude that the magistrate was not required to address all of the factors in section 14-10-114(3) when ruling on husband's motion to modify the existing award of spousal maintenance.

¶ 18 For the same reasons, we also reject husband's alternative, more limited, argument that the magistrate erred by not making findings as to the amount of his gross income and the applicable guideline amount of maintenance based on that income. *See* § 14-10-114(3)(a)(I)(A) (court shall find each party's gross income), § 14-10-114(3)(a)(II)(A) (court shall consider the guideline amount and term of maintenance if applicable). Again, those factors require findings when setting maintenance in the first instance, but not on a motion to modify. § 14-10-114(5).

C. Voluntary Underemployment

¶ 19 Husband challenges the magistrate's determination that he was voluntarily underemployed, as well as many of the subsidiary findings underlying that determination. We conclude that some of the magistrate's subsidiary findings are either irrelevant or unsupported by the record, so we remand for reconsideration of the ultimate determination that husband was voluntarily underemployed.

¶ 20 We reject wife's argument that this claim is unpreserved. Both the magistrate and the district court decided this issue, and husband raised it in his C.R.M. 7(a) petition for review.

1. Law

¶ 21 Whether a spouse is voluntarily underemployed is a mixed question of law and fact. *In re Marriage of Garrett*, 2018 COA 154, ¶ 9. We review the court's subsidiary findings for clear error, while we review the court's ultimate finding of voluntary underemployment either de novo or for an abuse of discretion.[3] *See People v. Martinez*, 70 P.3d 474, 476-77 (Colo. 2003) (concluding that "whether a parent is 'voluntarily unemployed or underemployed' . . . requires the trial court to make factual findings and apply a legal standard to those findings," without specifying the legal standard).

¶ 22 Voluntary underemployment means that the party is shirking a financial obligation "by unreasonably [forgoing] higher paying employment that he or she could obtain." *Id.* at 476-48; *see also Wright*, ¶ 21 n.3 ("Though *Martinez* was a child support case, the analysis of voluntary underemployment is the same in a maintenance case.").

2. Additional Facts

¶ 23 Husband testified that, as Hybir's CEO, he worked more than forty hours per week. He testified that he spent time each week interacting with an investment banker hired by Hybir to help sell the company, and that he regularly prepared, reviewed, and gave sales presentations.

¶ 24 The parties' stipulated exhibits included a resolution from the Hybir board of directors that decreased husband's salary (as well as the salary of Hybir's other officers). The board resolution stated, "the officers should be allowed to seek and accept part-time or fulltime employment with another firm or business." In her order, the magistrate found that husband "has permission and is encouraged to seek outside employment and obviously has the ability to do so."

¶ 25 Regarding husband's work as Hybir's CEO, the magistrate found,

> [Husband] testified that he travels out of state to see his girlfriend or do a variety of things 15 days per month. The court easily concludes, therefore, that he is not gainfully employed to his full capacity of his capability.

¶ 26 Ultimately, the magistrate found that husband

> is clearly underemployed; he's not working to his full potential . . . [he] has made no legitimate efforts to become employed full-time. Clearly he isn't, he's working max 20 hours per week. He made no effort to obtain secondary employment to fulfill his financial obligations to his former wife for his family and meet his own reasonable needs. Clearly, he has the ability to meet his needs as well as the financial needs to his former wife. He has made absolutely no effort to sell Hybir. He hasn't done a presentation since August 2018.

3. Remand is Required

¶ 27 We conclude that the magistrate must reconsider whether husband was voluntarily underemployed, without consideration of the unsupported or irrelevant facts identified below.

¶ 28 While we defer to the court's finding that husband "made absolutely no effort to sell Hybir" because there is evidence in the record to support it, this finding has nothing to do with whether husband was voluntarily underemployed. While perhaps the sale of husband's company could give him a one-time stockpile of financial assets with which to meet his maintenance obligation, that is not the inquiry for voluntary underemployment. Instead, the magistrate needed to determine whether husband was shirking his maintenance obligation "by unreasonably [forgoing] higher paying *employment*." *Martinez*, 70 P.3d at 479

(emphasis added).

¶ 29 If husband sold Hybir, it is far from clear what his position would be at the company (or if he would have one). As to other employment opportunities, the undisputed evidence was that he could earn $120, 000 to $150, 000 annually at another job in his field, which is *less* than what the parties agreed husband was making at Hybir at the time of the hearing. Therefore, the fact that husband had not made reasonable efforts to sell Hybir does not support the magistrate's ultimate finding of voluntary underemployment.[4]

¶ 30 Next, we conclude that there is no record support for the magistrate's finding that husband worked "max 20 hours per week." The magistrate based this finding on the fact that (1) husband traveled fifteen days per month, sometimes to visit his girlfriend; (2) testimony of Hybir officer Craig Ross that husband's job "probably [did] not" require a forty-hour work week;[5] and (3) the board resolution lowering husband's salary and permitting officers to seek outside employment. While this evidence may have supported a finding that husband was not working full time, the evidence does not support the magistrate's finding that husband was working no more than twenty hours per week. There is simply no basis in the record for that number.

¶ 31 The twenty-hour number is not supported by the fact that husband traveled fifteen days per month. To find that husband only worked twenty hours per week, the magistrate seemed to have implicitly found that husband never worked while he traveled. But, given the advent and prominence of telework, it is well established that going into the office is not a prerequisite for performing work; husband testified to this effect. His uncontradicted testimony was that he often worked remotely and that most of his work could be, and in some cases needed to be, done outside of the office. Absent express findings and supporting evidence to the contrary, the court's implicit finding that husband never worked while he traveled is unsupported by the record. At bottom, the fact that there was some evidence that husband was not working full time did not, without more, permit the magistrate to pull a number out of thin air.

¶ 32 We next conclude that the magistrate's finding that husband could get a *second* job making $130, 000 to $150, 000 annually is unsupported by the record. Husband testified that he could earn $120, 000 to $150, 000 as a computer programmer for other companies, but husband's testimony (and the job postings in the exhibits he referenced) concerned *full-time* jobs. There is no support in the record for the conclusion that husband could have earned an *additional* $150, 000 while still working at Hybir.

¶ 33 We also recognize that even if the court had accurately imputed an additional $150, 000 to husband's income, his total income (imputed income plus his Hybir salary) would not exceed $350, 000 - *less than half* of what he had been earning when the court approved the original $20, 000 per-month maintenance order. Even with the imputed salary, husband's monthly income dropped from $70, 000 to $29, 000.[6] So, even if husband's imputed income was that which the magistrate implicitly found, the magistrate did not explain (and we cannot discern) how this salary reduction would not constitute a substantial and continuing change to make the terms of the original maintenance award - $20, 000 per month - unfair.

¶ 34 Because many of the magistrate's findings supporting her ultimate finding of voluntary underemployment are clearly erroneous, and because the magistrate's voluntary underemployment finding was central to her order denying husband's motion to modify, we remand for reconsideration of voluntary underemployment. If the district court or the magistrate again determines that husband is shirking his maintenance obligation by forgoing higher paying employment, then the court or the magistrate must explain how that finding bears on its conclusion that there have not been changed circumstances so substantial and continuing as to make the existing maintenance terms unfair. To the extent a voluntary underemployment finding is being used to support the proposition that

husband would have adequate financial resources to pay the existing maintenance if fully employed, then the court must calculate husband's imputed income, *Martinez*, 70 P.3d at 477, and analyze the effect the imputation has on husband's financial circumstances.

¶ 35 Given our remand, we decline to address whether the magistrate ruled or implied that husband should fire all of Hybir's employees to create additional employment and income for himself, or whether the magistrate assumed, without record support, that husband had the authority to do so. The magistrate reasoned that husband "could run the company by himself . . . which means he wouldn't need all the other people that he employs or claims he needs to employ." We are aware of no Colorado precedent permitting a court to direct a party to fire employees of a legally distinct entity and take their jobs and salaries in order to satisfy a maintenance obligation.

D. Deposits Into Husband's Bank Account

¶ 36 Next, husband contends that the magistrate erred by concluding that he had sufficient resources to meet his maintenance obligation based on various deposits into his checking account. Husband contends that the magistrate erroneously drew inferences about him having "hidden income" when the undisputed evidence showed that his income was approximately $200, 000 annually. We conclude that this issue requires further findings.

¶ 37 When considering whether to modify a maintenance award, the dispositive determination is not necessarily the mere calculation of "income." *In re Marriage of Bowles*, 916 P.2d 615, 618 (Colo.App. 1995). "Indeed, mere increases or decreases in earnings do not require the conclusion that the amount of maintenance has become unconscionable . . . ." *Id.* Rather, the parties' present financial situation and ability to earn are the controlling factors in determining maintenance issues. *In re Marriage of Nevil*, 809 P.2d 1122, 1123 (Colo.App. 1991). Thus, a motion to modify requires the court to consider *all* relevant circumstances of both parties. *Bowles*, 916 P.2d at 618.

¶ 38 Husband claimed that he had been paying maintenance, despite his substantially reduced income, by selling stocks from a brokerage account that he had inherited. Wife agreed with this representation in her opening statement, alleging that the large deposits into husband's checking account came from an inheritance.

¶ 39 The magistrate found,

> [w]hile [husband] claims that he makes only $15, 000 to $17, 000 per month, the deposits into his bank accounts show otherwise. The court can consider his resources from his income and his resources regardless of where they come from. This is access to money that he has that clearly would allow him to meet his ongoing maintenance obligation.

¶ 40 The parties apparently agree that the deposits were from the inheritance, but the magistrate did not so find. The magistrate made no findings as to how large the inheritance was, or if it was a financial resource that husband could use to continue to meet his maintenance obligation. "The court's findings must be sufficiently specific so as to inform the appellate court of the basis for its order." *Garrett*, ¶ 11. We conclude that the magistrate did not make sufficient findings on this issue to permit meaningful review, so we remand for further consideration.

E. The Children's Needs

¶ 41 Husband next contends that the magistrate inappropriately relied on wife's testimony about the children's needs. We reject this argument.

¶ 42 True, wife testified that reducing the maintenance award would not allow her to provide for the children because raising four children is expensive. However, the magistrate's order demonstrates that this fact did not influence

her decision.

¶ 43 To the contrary, the magistrate focused on wife's ability to meet her own basic needs. *See In re Marriage of Kann*, 2017 COA 94, ¶ 25 (maintenance ensures that the lesser-earning spouse has means to pay for food, clothing, and shelter). For example, the magistrate found that if maintenance were reduced to $5, 133 as husband urged, wife would be unable to afford the $5, 800 mortgage. The magistrate also found that wife's monthly expenses were reasonable and that, despite her efforts to modify them, she still could not meet her reasonable expenses because of a lack of work experience and limited education.

F. Closing Argument

¶ 44 During closing argument, wife's counsel urged the magistrate to review husband's bank statements to get "his complete financial picture." The magistrate did, and she found that the exhibits refuted husband's claim that he made only $15, 000 to $17, 000 per month and lacked sufficient income to meet his maintenance obligation. Husband now contends that the magistrate erred in relying on those exhibits because they were not discussed before closing argument. The record belies this argument.

¶ 45 The parties stipulated to the admission of all exhibits during the hearing, including the bank statements. Contrary to husband's assertion, he testified about the bank statements during the hearing. Specifically, wife's counsel directed him to the bank statements when eliciting testimony that he paid rent for his girlfriend in Louisiana between April and December 2018 and made significant cash withdrawals during the pendency of the proceedings. Additionally, wife asserted in the parties' joint trial management certificate that husband's "financial information indicates there is a continued stream of income" to support his spending, including "lavish purchases" and "significantly large cash withdrawals." The magistrate did not err by considering those exhibits.

**III. Appellate Attorney Fees**

¶ 46 Wife seeks an award of her appellate attorney fees under section 13-17-102(4), C.R.S. 2020, arguing that husband's appeal is substantially frivolous and groundless because he raised the same arguments in his C.R.M. 7(a) petition for review and failed to comply with C.A.R. 28. Having found that some of husband's contentions are meritorious, we deny wife's request.

¶ 47 Wife also seeks an award of her appellate attorney fees under section 14-10-119, C.R.S. 2020, which allows a court to apportion costs and fees equitably between parties based on their relative ability to pay. *See In re Marriage of Gutfreund*, 148 P.3d 136, 141 (Colo. 2006). We remand for reconsideration of this issue.

**IV. Conclusion**

¶ 48 The order is reversed, and the case is remanded for further proceedings consistent with this opinion. Specifically, the court[7] must reconsider and make explicit findings on (1) husband's voluntary underemployment and imputed income and (2) the source and size of the deposits into his checking account. The court, in its discretion, may allow the parties to present more evidence, or it may make additional findings on the existing record, but we note that any further orders must be based on the parties' financial conditions at the time of the hearing. *Wright*, ¶ 24. Then, the court must address wife's request for appellate attorney fees under section 14-10-119.

JUDGE RICHMAN and JUDGE WELLING concur.

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Notes:

[1] For convenience, we call the parties "husband" and "wife," though we recognize that they are no longer married.

[2] This is not a case where the court reserved jurisdiction to modify maintenance under section 14-10-114(3)(g), C.R.S. 2020.

[3] Because it makes no difference to our analysis or disposition, we do not address whether de novo or abuse of discretion review applies to a court's finding of voluntary underemployment.

[4] It is unclear whether this finding pertained to voluntary underemployment (which is the context in which the magistrate addressed the finding) or rather was evidence in support of the magistrate's finding that husband was only working twenty hours per week. Regardless, our conclusion is the same: this fact does not support the ultimate determination of voluntary underemployment.

[5] Ross also testified repeatedly that he was not aware of what husband did at his job on a day-to-day basis.

[6] Husband's annual salary including imputed income ($350, 000) divided by twelve months is approximately $29, 000 per month.

[7] The district court retains discretion whether to decide these issues itself or to refer these matters to a magistrate. *See* C.R.M. 7(a)(8).

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