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Affirmed in part, reversed in part, and remanded

Considered and decided by Klaphake, Presiding Judge; Kalitowski, Judge; and Wright, Judge.

UNPUBLISHED OPINION

Appellant-father challenges the district court's decision denying appellant's request for sole physical custody of the parties' children and setting appellant's child-support obligation at the guidelines amount. Appellant argues that the district court erred when it (1) determined that the parties' extra-judicial agreement was breached and abandoned; (2) did not require the parties to participate in dispute resolution; (3) overstated appellant's income; and (4) denied appellant's motion to modify custody without an evidentiary hearing. Because the district court erred in its calculation of appellant's monthly net income for child-support purposes and failed to make express findings regarding health-insurance coverage for the children as required by Minn. Stat. § 518.171, subd. 1(a) (2004), we reverse and remand on these issues. As to the other issues raised in this appeal, we affirm.

FACTS

The district court entered a judgment and decree dissolving the marriage of appellant-father Eric Amundson and respondent-mother Rachel Amundson on December 4, 2000. In the judgment and decree, the district court granted the parties joint legal custody of their two children. Mother was granted sole physical custody of the children and ordered to pay for the children's health insurance. The district court ordered father to pay monthly child support of \$500. In August 2001, father began to pay for health-insurance coverage of the children through his employment.

The parties entered into a written extra-judicial agreement on April 8, 2002, which modified the parties' court-ordered obligations. The agreement modified mother's sole physical custody of the children to joint physical custody and established a weekly rotating schedule in which "each party will have the children three days one week and four days the next." Under the agreement, father would cease paying child support on May 31, 2002. The parties were not represented by counsel when they entered the agreement, and the extra-judicial agreement was never affirmed by the district court.



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The children lived with father on a full-time basis from July 2002 to April 2003. But in April 2003, the children began to live with mother full-time. The parties informally agreed that father would not pay child support from April 2003 to January 2004 to compensate father for expenses he incurred while the children lived with him full-time.

On October 21, 2005, mother moved to modify the December 2000 judgment and decree, seeking an increase in father's monthly child-support obligation to the guidelines amount, an award of both dependency tax exemptions, an order requiring father to pay one-half of the children's medical and dental expenses,¹ and a judgment against father for \$1,380 in unpaid child support. In response, father moved to dismiss mother's motion, award father sole physical custody of the children, and order the parties to participate in mediation.

After a hearing on the motions, the district court issued an order dated January 18, 2006, in which it set father's monthly child-support obligation at \$864.57, ordered father to pay \$1,380 in arrearages, granted mother the right to claim both children as exemptions for tax purposes, and reaffirmed the judgment and decree's provision granting mother sole physical custody of the children. This appeal followed.

DECISION

The district court has broad discretion in deciding whether to modify child support, *Putz v. Putz*, 645 N.W.2d 343, 347 (Minn. 2002), and child custody, *Silbaugh v. Silbaugh*, 543 N.W.2d 639, 641 (Minn. 1996). We review a decision on these matters to determine whether the district court abused its discretion by making factual findings unsupported by the evidence or by misapplying the law. *Pikula v. Pikula*, 374 N.W.2d 705, 710 (Minn. 1985). A district court abuses its discretion when it makes a child-support or child-custody determination based on findings that are contrary to the facts and logic. *Putz*, 645 N.W.2d at 347.

I.

Father contends that the district court abused its discretion when it determined that the April 2002 extra-judicial agreement, which modified mother's sole physical custody to joint physical custody with the children spending four nights a week with each parent every other week and terminated father's child-support obligation, was breached and abandoned. Minnesota courts have approved extra-judicial modification of an existing judgment and decree through stipulated agreement. See *Kielley v. Kielley*, 674 N.W.2d 770, 774-75 (Minn. App. 2004) (recognizing Minnesota Supreme Court's endorsement of stipulated arguments); see also *Shirk v. Shirk*, 561 N.W.2d 519, 521 (Minn. 1997) (stating policy favoring use of stipulations in dissolution proceedings). But these stipulations are given considerably less weight when the agreement involves children. *Kielley*, 674 N.W.2d at 776; see *Frauenschuh v. Giese*, 599 N.W.2d 153, 158-59 (Minn. 1999) (holding that district court is not bound by stipulations involving child custody); *Tammen v. Tammen*, 289 Minn. 28, 30, 182 N.W.2d 840, 842



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(1970) (noting that child-support stipulations are given less weight to protect "the welfare of the child[ren] as the paramount consideration").

The enforceability of an extra-judicial agreement depends on whether the agreement is both contractually sound and otherwise fair and reasonable. *Kielley*, 674 N.W.2d at 777-78. To be contractually sound, the extra-judicial agreement must be supported by consideration. *Id.* at 777. Whether the agreement is supported by consideration is a legal question, which we review de novo. *Id.*

Consideration is "'a benefit accruing to a party or a detriment suffered by another party.'" *Id.* (quoting *C & D Invs. v. Beaudoin*, 364 N.W.2d 850, 853 (Minn. App. 1985), review denied (Minn. June 14, 1985)). The amount of consideration is not relevant to a determination of an agreement's enforceability. *Id.* When parties make mutual, concurrent promises that are incorporated into a bilateral contract, such promises are sufficient consideration for each other. *Koehler & Hinrichs Mercantile Co. v. Illinois Glass Co.*, 143 Minn. 344, 346, 173 N.W. 703, 704 (1919).

The district court concluded that the extra-judicial agreement was supported by consideration. The agreement provided that father would cease child-support payments in exchange for changing mother's sole physical custody to joint physical custody with father. These mutual, concurrent promises suffice as consideration.

Also, to be enforceable, an extra-judicial agreement must not be unfair or unreasonable to (1) the children by causing an adverse impact on them; (2) one of the parties as a result of overreaching, a lack of disclosure, or lack of opportunity to consult with counsel; (3) the state by causing one or both parties to seek public assistance; and (4) the district court by unnecessarily complicating future court proceedings. *Kielley*, 674 N.W.2d at 778-79. In determining the enforceability of an extra-judicial agreement, the district court may accept or reject the terms of the agreement in whole or in part. *Id.* at 779.

The district court concluded that, because father breached and abandoned the extra-judicial agreement, it was unnecessary to address whether the agreement was fair and reasonable. A breach occurs when one party fails to perform without legal justification a substantial part of the agreement or contract. *Estate of Reidel by Mirick v. Life Care Ret. Cmty., Inc.*, 505 N.W.2d 78, 81 (Minn. App. 1993). A finding of abandonment requires clear and convincing evidence of a party's intention to abandon its rights. *Republic Nat'l Life Ins. Co. v. Marquette Bank & Trust Co. of Rochester*, 295 N.W.2d 89, 93 (Minn. 1980). Such intention may be ascertained from the particular facts and circumstances or implied from the acts of the parties. *Id.*

Father initially complied with the terms of the extra-judicial agreement. He ceased his child-support payments on May 31, 2002. But the children moved in with father on a full-time basis in July 2002, which was contrary to the extra-judicial agreement. In April 2003, following an altercation between



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father and the parties' older child, the children began to live with mother full-time. The parties informally agreed that father would not be required to pay child support from April 2003 to January 2004 to compensate father for expenses incurred while the children lived with him full-time.

Father argues that the children's return to residing with mother is not inconsistent with the joint physical custody set forth in the extra-judicial agreement. When viewed in its entirety, however, the record supports the district court's finding that the extra-judicial agreement was breached or abandoned. Contrary to the terms of the extra-judicial agreement, father resumed paying child support and acknowledges that he and mother never shared a 50/50 parenting-time schedule as set forth in the agreement. Father estimates that he exercised parenting time 40 percent of the time in 2004 and every other weekend in 2005.

More than three and one-half years have passed since either party has complied with the terms of the extra-judicial agreement. With the exception of nine months beginning in July 2002 and ending in April 2003, the custody arrangement has been consistent with that of the December 2000 judgment and decree. Because the actions of the parties establish clear and convincing evidence of the parties' intention to abandon their rights under the extra-judicial agreement, the district court did not err by concluding that the extra-judicial agreement was breached and abandoned and, therefore, unenforceable.

II.

Father argues that the district court erred by failing to require the parties to submit to dispute resolution as required by the judgment and decree, which provides in pertinent part:

The parties are granted joint legal custody of the said minor children of the parties. In the event the parties are unable to agree and cooperate to resolve major decisions regarding their children's lives, they shall attempt to resolve such disputes by seeking the services of a mutually agreeable neutral third party.

"[J]oint legal custody means that both parents have equal rights and responsibilities including the right to participate in major decisions determining the child's upbringing, including education, health care, and religious training." Minn. Stat. § 518.003, subd. 3(a) (2000).

Because the joint legal-custody provision in the judgment and decree mirrors the operative statutory definition of joint legal custody in effect at that time, and because the dispute-resolution provision is in the paragraph addressing joint legal custody, it is evident that this language is applicable to questions of joint legal custody. At issue here are issues of child support and physical custody. As such, the judgment and decree's dispute resolution requirement for disputes regarding joint legal custody is inapplicable.



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III.

Father next contends that the district court erred by setting father's monthly child-support obligation at \$864.57. A child-support order may be modified on a showing of substantially increased or decreased earnings of a party that make the original order unreasonable and unfair. Minn. Stat. § 518.64, subd. 2(a)(1) (2004); *Erickson v. Erickson*, 385 N.W.2d 301, 303 (Minn. 1986). The child-support guidelines are presumptively applicable in all child-support cases. Minn. Stat. § 518.551, subd. 5(i) (2004). Under the child-support guidelines, the obligor's net income is multiplied by a specified percentage to calculate the support obligation. *Id.*, subd. 5(b) (2004). "Net income" is the obligor's total monthly income after deducting:

(i) Federal Income Tax (ii) State Income Tax (iii) Social Security Deductions (iv) Reasonable Pension Deductions (v) Union Dues (vi) Cost of Dependent Health Insurance Coverage (vii) Cost of Individual or Group Health/Hospitalization Coverage or an Amount for Actual Medical Expenses [and] (viii) A Child Support or Maintenance Order that is Currently Being Paid.

Id., subd. 5(b). "Current net income must be determined for purposes of setting child support." *Merrick v. Merrick*, 440 N.W.2d 142, 146 (Minn. App. 1989).

Father argues that his child-support obligation is based on clearly erroneous factual findings. We agree. A review of the record establishes that the district court's calculation of father's monthly net income contained mathematical errors and treated the children's dependency tax exemptions inconsistently. The district court also did not make express findings as to the children's health insurance, and it relied on erroneous calculations to determine the amount of father's arrearages.

The district court concluded that father's monthly net income has increased substantially since the judgment and decree. The district court calculated an increase from \$1,650 to \$2,881.91, and set father's monthly child-support obligation at \$864.57 based on the child-support guidelines.² In doing so, the district court adopted mother's calculation of father's monthly net income of \$2,881.91 and net year-to-date income at \$30,495.09, both of which mother derived from father's November 2005 pay stub. Father's pay stub indicated a year-to-date gross income of \$39,598.93 and deductions of \$727.67 for federal income tax withholdings, \$446.44 for state income tax withholdings, \$2,850.51 for social security, \$366.60 for union dues, \$1,457.28 for health insurance, and \$2,252.74 for retirement contributions. Subtracting these deductions from father's gross income equals \$31,497.69, not \$30,495.09. Because the district court's determination of father's monthly net income was based on a miscalculation, the district court's determination of father's monthly child-support obligation is clearly erroneous.

The district court also treated the children's dependency tax exemptions in an inconsistent manner. The district court awarded both dependency tax exemptions to mother, as the custodial parent. See *State ex rel. Rimolde v. Tinker*, 601 N.W.2d 468, 472 (Minn. App. 1999) (stating that generally income



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tax dependency exemption goes to custodial parent). But the 2005 pay stub used by the district court to determine father's monthly net income indicates father's filing status as "single" with two dependency tax exemptions. Thus, the district court gave father one dependency tax exemption for purposes of calculating his child-support obligation but awarded mother both dependency tax exemptions in the modification order without any explanation for this apparently inconsistent treatment.

We are unable to reconcile the district court's findings with the evidence relating to father's monthly net income.³ Because father's child-support obligation must be based on an accurate calculation of his monthly net income, we remand for a determination of father's monthly net income as defined by Minn. Stat. § 518.551, subd. 5(b), supported by findings as to each element of the calculation.

In her motion and supporting affidavit, mother sought an order requiring father to continue to maintain health insurance for the children and to pay one-half of the children's medical, dental, visual, and orthodontia expenses. Father argues that, because the district court did not make express findings regarding the children's health insurance, mother should provide health-insurance coverage for the children as required under the judgment and decree. Every child-support order must "expressly assign or reserve the responsibility" for maintaining health insurance for minor children. Minn. Stat. § 518.171, subd. 1(a)(1) (2004). The district court must order the party with the better dependent health-insurance coverage available on a group basis or through an employer or union to name the minor children as beneficiaries. *Id.*, subd. 1(a)(2) (2004).

Father has been providing the children's health insurance through his employer since August 2001, and he has provided the district court with his employer's group insurance information. Although the district court deducted health insurance in its calculation of father's monthly net income, it did not expressly find that father should continue to provide the children's health insurance or otherwise revise mother's obligation to do so under the judgment and decree. Nor did the district court find that father has better dependent health-insurance coverage than mother as required by Minn. Stat. § 518.171, subd. 1(a)(2). We, therefore, remand this issue to the district court with instructions to make findings addressing the responsibility for the children's health-insurance coverage as required by Minn. Stat. § 518.171, subd. 1(a), and to account for this determination in the recalculation of father's monthly net income for child-support purposes.

Father also argues that the district court erroneously relied on misstated and miscalculated information to find that father owes mother \$1,380 in unpaid child support. An arrearage is money overdue and unpaid. *County of Nicollet v. Haakenson*, 497 N.W.2d 611, 616 (Minn. App. 1993). Father paid monthly child support in the amount of \$361.83, rather than the court-ordered amount of \$500, for the 20 months for which mother seeks arrearages. Father argues on appeal that, after subtracting a dollar-for-dollar deduction for health insurance from his \$500 monthly child-support obligation, his payments were \$69 short per year. In his affidavit, however, father stated that he had "come up short \$69 per month." Mother's affidavit also indicates that father has acknowledged owing mother



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\$69 per month from April 2004 to December 2005. Based on the affidavit evidence, the district court awarded mother \$1,380 in arrearages.

Father's child-support arrearages must be based on his monthly net income. Minn. Stat. § 518.551, subd. 1 (Supp. 2005). Father's net income is his total monthly income after deducting, among other expenses, the children's health-insurance costs. *Id.*, subd. 5(b)(iv). Father's monthly child-support obligation is a percentage of this net income. *Id.* But father erroneously calculated the amount of his unpaid child-support obligation by deducting the children's health-insurance expenses dollar-for-dollar from his monthly child-support obligation. The district court relied on the parties' erroneous submissions to determine father's child-support arrearages. Using the proper calculation, father's arrearages appear to be more than \$1,380. Thus, the district court's determination, while erroneous, does not prejudice father and is not grounds for reversal. Minn. R. Civ. P. 61; *Midway Ctr. Assocs. v. Midway Ctr., Inc.*, 306 Minn. 352, 356, 237 N.W.2d 76, 78 (1975) ("[E]rror without prejudice is not ground for reversal." (quotation omitted)).

IV.

Father also argues that the district court abused its discretion by denying his motion to modify custody without an evidentiary hearing. When we review a district court's decision to deny a custody-modification motion without an evidentiary hearing, we apply an abuse-of-discretion standard. In *re Weber*, 653 N.W.2d 804, 809 (Minn. App. 2002). A district court may not modify custody absent an evidentiary hearing. *Auge v. Auge*, 334 N.W.2d 393, 396 (Minn. 1983); *Hummel v. Hummel*, 304 N.W.2d 19, 20 (Minn. 1981). But before a district court is required to hold an evidentiary hearing in a custody modification proceeding, the movant must make a *prima facie* showing that it can satisfy the statutory requirements. *Westphal v. Westphal*, 457 N.W.2d 226, 228 (Minn. App. 1990). Under the statutory requirements for an integration-based custody modification, the movant must allege each of three elements: (1) a change in the circumstances of the child; (2) modification is necessary to serve the child's best interests; and (3) the child has been integrated into the home of the moving party with the consent of the other party. Minn. Stat. § 518.18(d) (2004); see *Downey v. Zwigart*, 378 N.W.2d 639, 642 (Minn. App. 1985) (applying Minn. Stat. § 518.18(d) in an integration context).

A party seeking custody modification must submit an affidavit in support of the motion. Minn. Stat. § 518.185 (2004). The district court must accept the facts as true, but need not grant an evidentiary hearing if the affidavit does not provide sufficient grounds for modification. *Nice-Petersen v. Nice-Petersen*, 310 N.W.2d 471, 472 (Minn. 1981); *Roehrdanz v. Roehrdanz*, 438 N.W.2d 687, 690 (Minn. App. 1989), review denied (Minn. June 21, 1989). The district court "may take note of statements in [an] affidavit that explain the circumstances surrounding the [moving party's] accusations." *Geibe v. Geibe*, 571 N.W.2d 774, 779 (Minn. App. 1997).

Father argues that the extra-judicial agreement changed the custody arrangement and the children



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were integrated into his home. While it is undisputed that the children lived with father from July 2002 to April 2003, his motion and supporting affidavit fail to address the fact that the children moved back in with mother on a full-time basis beginning in April 2003 and have continued to live with her since that time. Thus, the district court correctly characterizes the children's time with father as no more "than a temporary change in the pattern of caretaking." Even if the children were integrated into father's home from July 2002 to April 2003, when father's modification motion was filed, the children were reintegrated into mother's home, having resumed living with her more than two-and-one-half years ago. Cf. *Peterson v. Peterson*, 365 N.W.2d 315, 318 (Minn. App. 1985) (finding, after an evidentiary hearing, that no integration occurred where child lived with non-custodial father less than two years and living arrangement abruptly ended five months before father's modification motion), review denied (Minn. June 14, 1985). Thus, the district court's exercise of discretion on this issue was sound.

In summary, we affirm the district court's conclusions that the extra-judicial agreement was breached and abandoned, that the parties were not required to mediate issues of physical custody and child support, and that father was not entitled to an evidentiary hearing on his motion to modify physical custody. But because the district court clearly erred in its calculation of father's monthly net income for purposes of child support and failed to make express findings regarding the responsibility for the children's health-insurance coverage as required by Minn. Stat. § 518.171, subd. 1(a), we reverse and remand for further consideration of these matters.

Affirmed in part, reversed in part, and remanded.

1. In her supporting affidavit, mother also sought an order requiring father to continue to provide health-insurance coverage for the children.
2. When the obligor's monthly net income is between \$1,001 and \$6,975 and two children require support, the obligor's guidelines child-support obligation is 30 percent of the monthly net income. Minn. Stat. § 518.551, subd. 5(b), (k) (2004); Cost of Living Adjustment to Child Support Guidelines, No. C9-85-1134 (Minn. Mar. 11, 2004) (order).
3. Father also argues that the district court erred because it used federal and state income-tax-deduction amounts from father's 2005 pay stubs provided in mother's affidavit, rather than the tax tables. Minn. Stat. § 518.551, subd. 5(b), recommends, but does not require, using standard deductions and the tax tables to determine federal and state income-tax deductions when calculating monthly net income for child-support purposes. The district court's rationale for deviating from the statutorily recommended tax tables to calculate father's monthly tax deductions is not included in the order. On remand, the district court may choose to reconsider its method for calculating father's tax deductions, but it is not required to do so.

