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Minn. Stat. § 480A.08, subd. 3 (2008).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A09-1028**

In re the Marriage of:  
Thomas John Basting, Jr., petitioner,  
Respondent,

vs.

Susan Morse Makepeace,  
Appellant.

**Filed August 24, 2010  
Affirmed in part, reversed in part, and remanded  
Harten, Judge\***

Hennepin County District Court  
File No. 27-FA-08-2605

Diane B. Bratvold, Briggs and Morgan, P.A., Minneapolis, Minnesota; and

Debra E. Yerigan, Messerli & Kramer, P.A., Minneapolis, Minnesota (for respondent)

M. Sue Wilson, James T. Williamson, M. Sue Wilson Law Offices, P.A., Minneapolis,  
Minnesota (for appellant)

Considered and decided by Minge, Presiding Judge; Johnson, Judge; and Harten,  
Judge.

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

## UNPUBLISHED OPINION

**HARTEN**, Judge

In this dissolution action, appellant challenges the district court's award of temporary rather than permanent spousal maintenance and its calculation of temporary maintenance; respondent challenges the award of attorney fees to appellant. Because we see no abuse of discretion in the temporary maintenance award or its amount, but conclude that, in the interests of justice, district court jurisdiction over maintenance should be reserved after the award expires, we modify it accordingly and affirm it as modified; because the record does not contain sufficient findings to allow review of the attorney fee award, we reverse and remand for further findings.

### FACTS

In 1991, appellant Susan Makepeace and respondent Thomas Basting, both second-year law school students, were married. In 1992, they graduated and took the bar exam, which respondent passed but appellant did not. In 1993, their son was born; in 1996, their daughter was born.

Respondent worked for various law firms, joining his present firm, in which he is now a shareholder, in 2001. Appellant, after a second unsuccessful attempt to pass the bar exam, did not pursue a career in law. She remained at home with the children and, from 1999 to 2007, operated a photography business and reported its income on the parties' tax returns.

In July 2007, appellant experienced a mental breakdown and was hospitalized for a week. She has been diagnosed as suffering from bipolar disorder and is on medication.

In September 2007, the parties separated when appellant moved into an apartment. In 2008, this dissolution action began; appellant returned to the homestead, and respondent moved out. In 2009, the parties stipulated to the joint legal and physical custody of their children and equal parenting time.

Following a trial on child support, spousal maintenance, life insurance payments, division of marital estate, and attorney fees, the district court ordered judgment that awarded appellant (1) monthly child support payments of \$1,958; (2) temporary spousal maintenance with the monthly payments declining from \$7,774 in 2009 to \$6,607 in 2016; (3) the homestead, in which the parties' equity was about half the marital estate; and (4) \$34,598 in need-based attorney fees.

Appellant challenges the decision to disallow permanent spousal maintenance and the calculation of the amount of temporary maintenance. Respondent challenges the award of attorney fees to appellant.

## **D E C I S I O N**

### **1. Spousal Maintenance Award**

This court reviews a spousal maintenance award under an abuse of discretion standard. *Dobrin v. Dobrin*, 569 N.W.2d 199, 202 (Minn. 1997). Discretion is abused when the district court makes findings of fact unsupported by the record or improperly applies the law. *Id.* & n.3.

The district court found that: (1) respondent has a net monthly income of about \$15,000 and reasonable monthly expenses for himself and the children of about \$11,859; (2) appellant has reasonable monthly expenses for herself of \$8,190; and (3) from 2003 to

2007, appellant earned an average of \$916 annually from her photography business. The district court inferred that appellant could earn \$5,000 annually, or \$416 monthly, in 2009 and could increase her earnings by \$2,000 per year to \$19,000 annually, or \$1,583 monthly, in 2016. The district court set corresponding reductions in her spousal maintenance, from \$7,774 monthly (\$8,190 less \$416) in 2009 to \$6,607 (\$8,190 less \$1,583) in 2016.<sup>1</sup>

#### **A. Temporary Spousal Maintenance**

Appellant argues that, because her ability to support herself is uncertain, the district court erred in not awarding her permanent spousal maintenance. *See* Minn. Stat. § 518.552, subd. 3 (2008) (“Where there is some uncertainty as to the necessity of a permanent award, the court shall order a permanent award leaving its order open for later modification.”). But the uncertainty mentioned in the statute refers to *if* the party seeking maintenance will become self-supporting, not to *when* this will happen. *Maiers v. Maiers*, 775 N.W.2d 666, 669 (Minn. App. 2009). Here, the district court’s comprehensive findings on appellant’s present and future ability to support herself reflect the view that appellant will eventually be able to support herself, but that this is unlikely within the next eight years.

The findings pertain to the factors set out in Minn. Stat. § 518.522, subd. 2 (2008).

Until [appellant] is able to liquidate the marital homestead [in 2015, when the younger child graduates from high school], she will not have access to the equity [\$500,000] in the home, and thus will not have the ability to meet her needs independent of spousal maintenance. The Court thus finds that [appellant] does not currently have the financial resources or

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<sup>1</sup> In 2016, the parties’ children will be 23 and 20.

marital property to meet her needs independently, but that she may have this ability in the future.<sup>[2]</sup>

....

The Court finds that [appellant's] lack of employment history, age and mental health issues raise significant doubts about her ability to be trained for appropriate employment consistent with her education [i.e., her law degree]. However, the Court finds that [appellant] has the potential to enhance her skills in photography and expand her photography business in the future. The Court also believes that [appellant] is of sufficient intelligence and education that she will eventually be able to earn income that will allow her to meet some, if not all, of her needs.<sup>[3]</sup>

....

. . . [Appellant's] lack of employment history diminishes her earning capacity. However . . . [appellant] has the ability to generate income through her photography business.<sup>[4]</sup>

....

[Appellant] is 47 years and, given her lack of employment history and her mental health issues, is unlikely to be able to enter the workforce in the foreseeable future. [Appellant] suffered a mental breakdown prior to the parties' separation, and provided proof of her inability to deal with stressful situations. While these factors work against [appellant's] ability to enter the general workforce, [her] mental health is stabilizing and she has been able to overcome those difficulties in her work as a photographer. The Court thus finds that [appellant's] age and emotional condition do not render her incapable of continuing to work on her photography business, and to grow it with some time and effort. Further, given her obvious intelligence and education, the Court believes that [appellant] will eventually be able to generate a more substantial income through her photography business.<sup>[5]</sup>

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. . . At the conclusion of 8 years [of spousal maintenance], both children will have emancipated, [appellant] will have had sufficient time to

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<sup>2</sup> See Minn. Stat. § 518.552, subd. 2(a) (listing financial resources of party seeking maintenance, including marital property apportioned to party, and party's ability to meet needs independently as a factor to be considered in determining maintenance).

<sup>3</sup> See *id.*, subd. 2(b) (listing time needed to acquire training for employment and probability of party becoming fully or partially self-supporting as a factor to be considered in determining maintenance).

<sup>4</sup> See *id.*, subd. 2(d) (listing length of absence from employment and extent to which earning capacity is permanently diminished as a factor to be considered in determining maintenance).

<sup>5</sup> See *id.*, subd. 2(f) (listing age and emotional condition of party seeking maintenance as a factor to be considered in determining maintenance).

fully develop her photography business, and [appellant] could liquidate the marital property she receives in this proceeding and invest the proceeds to provide for her future needs. Additionally, [appellant's] monthly budget includes an amount for her retirement, which she can use in addition to the income she receives from her investment.

Thus, the district court did not find either that appellant would never be able to meet her own needs or that it is uncertain whether she will ever be able to do so; it found that whether she can do so within the next eight years is uncertain, and it provided maintenance for those eight years.<sup>6</sup>

This was not an abuse of discretion. *See Maiers*, 775 N.W.2d at 669-70 (affirming temporary maintenance award for five years when district court was uncertain whether recipient would become self-supporting within five years). “A district court does not err by awarding temporary spousal maintenance and reserving jurisdiction after finding that the recipient of maintenance will become self-supporting, even if it is uncertain when the recipient will become self-supporting.” *Id.*

*Maiers* relies on *Aaker v. Aaker*, 447 N.W.2d 607, 611 (Minn. App. 1989) (affirming temporary maintenance for spouse aged 39 based on her age, education, and ability to obtain further education), *review denied* (Minn. 12 Jan. 1990), and on *Hall v. Hall*, 417 N.W.2d 300, 303 (Minn. App. 1988) (affirming three-year temporary maintenance award for spouse aged 39 in an 18-year marriage who had a high school diploma and intended to pursue a college degree); *Maiers* distinguishes *Nardini v.*

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<sup>6</sup> Appellant objects to the fact that the district court heard no expert testimony as to how much income a free-lance photography business might generate. But maintenance is awarded “in those instances where the spouse seeking maintenance makes the requisite showing of need.” *Dobrin*, 569 N.W.2d at 203. The responsibility for providing evidence as to her potential future income was appellant's.

*Nardini*, 414 N.W.2d 184, 199 (Minn. 1987) (reversing temporary maintenance award for spouse with high-school education after 31-year marriage because it was uncertain that she would ever be self-supporting).

Appellant is now 48; she was married for 17 years; she has an undergraduate degree in photography and a law degree; she has worked as a photographer with gross earnings in the last five years ranging from \$15,643 in 2003 to \$1,550 in 2007.<sup>7</sup> Her situation is more comparable to those in *Maiers*, *Aaker*, and *Hall* than to that in *Nardini*.

Appellant relies on *Zamora v. Zamora*, 435 N.W.2d 609 (Minn. App. 1989), but *Zamora* is distinguishable: its reversal of a denial of permanent spousal maintenance was based on the fact that, in the three years since the dissolution, the recipient demonstrated that she could not become self-supporting: her physical condition (diabetes) had worsened; she had completed one night course in bookkeeping but had to quit accounting class because of her illness; she had been unable to find full-time employment; and she earned only \$300 per month. *Id.* at 611-12.

Appellant's psychiatrist testified in his January 2009 deposition that appellant had not experienced a recurrence of her July 2007 breakdown and that, when he last saw her in September 2008, "she didn't have any significant anxiety or depression and she felt pretty stable."<sup>8</sup> Moreover, nothing in the record suggests that appellant has made any

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<sup>7</sup> We note also that, while both parties and the district court focused their attention on photography as the means by which appellant can generate income, she is free to pursue alternative earning opportunities.

<sup>8</sup> The testimony of appellant's psychiatrist was inconclusive on the relationship between her illness and her ability to work. He testified that appellant should avoid stress and remain on medication; that she was competent to care for her children; that "the huge

effort to become self-supporting. As the recipient of temporary maintenance, she has a duty to do so; if her good-faith effort proves unsuccessful, her maintenance may be continued or modified. *See Carrick v. Carrick*, 560 N.W.2d 407, 411 n.1 (Minn. App. 1997).

Appellant further argues that the district court abused its discretion by imputing income to her without making a finding of bad faith. We disagree. A finding that a party seeking maintenance will have the ability to meet needs independently does not require a finding of bad faith. *Rauenhorst v. Rauenhorst*, 724 N.W.2d 541, 545 (Minn. App. 2006) (quoting *Schallinger v. Schallinger*, 699 N.W.2d 15, 17 (Minn. App. 2005), *review denied* (Minn. 28 Sept. 2005)). Here, the district court found that, like the maintenance recipients in *Rauenhorst* and *Schallinger*, appellant is likely to be able to meet her needs independently after some time.<sup>9</sup>

The award of temporary spousal maintenance was not an abuse of discretion.

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thing stressing her was her marriage”; that her stress level would be lower after the dissolution; and that “whatever would stress her the least is going to give her the best chance of staying stable.” He also said he had never written a letter saying appellant’s illness affected her ability to work and agreed when asked, “you have not said that [appellant] should not get a job?” He replied, “I would say yes,” when asked if appellant’s photography “besides perhaps earning some income, is something that’s enjoyable to her, . . . that could actually be beneficial for her?” But when asked to assume that appellant were forced by the dissolution judgment “to work to earn money,” he replied, “It all depends on how she perceives it. But if they force her, then I suspect it would be stressful.”

<sup>9</sup> We note that the district court did not find that appellant will be able to meet her needs exclusively through employment, and no such finding is required. *See Rauenhorst*, 724 N.W.2d at 545 n.2 (noting that imputation of income is not the only way a district court can find that a party can meet needs independently and that the legislature has provided no directives for how a district court is to evaluate a spouse’s ability to meet needs independently).

## **B. Calculation of Temporary Spousal Maintenance**

The district court determined that appellant's reasonable monthly expenses, in light of the marital standard of living, are \$8,190 and calculated maintenance by subtracting her anticipated monthly earnings (ranging from \$416 in 2009 to \$1,583 in 2016) from that amount. Appellant argues that this is insufficient because she "is entitled to support that will not simply supply her with the bare necessities of life, but such a sum as will keep her in the situation and condition commensurate with the marital standard of living and Respondent's ability to support her." For this argument, she relies on *Arundel v. Arundel*, 281 N.W.2d 663, 666-67 (Minn. 1979). But *Arundel* noted that "the life style of both parties will inevitably be affected by the dissolution," *id.* at 667, and affirmed an award of \$2,000 rather than the \$3,200 requested. "While we are less than convinced that a higher award would not be appropriate in light of the high standard of living enjoyed by the parties and respondent's substantial income [annual gross income of around \$105,000], we are not free to substitute our judgment for that of the trial court absent a clear abuse of its discretion." *Id.* As in *Arundel*, nothing here indicates that the district court made findings of fact unsupported by the record or improperly applied the law. *See Dobrin*, 569 N.W.2d at 202 & n.3 (defining abuse of discretion in these terms).

Appellant also argues that the district court abused its discretion by failing to consider the tax implications of her spousal maintenance award because she will actually retain only 85% of the amount awarded. But considering tax implications in awarding spousal maintenance is discretionary, not mandatory. *Maurer v. Maurer*, 623 N.W.2d 604, 607 (Minn. 2001). Moreover, the district court found that respondent's net monthly

income is about \$15,000 and that “[appellant’s] monthly expenses [for herself] total approximately \$8,200 per month, leaving [respondent] with less than \$7,000 each month with which to pay child support [\$1,958] and cover his own expenses [about \$11,859 for himself and the children.]” The district court did not abuse its discretion by failing to consider the tax implications. Absent any abuse of discretion, there is no basis to reverse the spousal maintenance award.<sup>10</sup>

### **C. Reservation of Jurisdiction<sup>11</sup>**

The district court will retain jurisdiction over appellant’s temporary spousal maintenance until it expires at the end of 2016 under Minn. Stat. § 518A.39, subd. 1 (2008) (providing that “[a]fter an order under . . . chapter 518 for maintenance . . . , temporary or permanent, . . . the court may from time to time, on motion of either of the parties, . . . modify the order respecting the amount of maintenance or support money, and the payment of it”). But the district court here did not reserve jurisdiction over the maintenance award and will therefore lose jurisdiction at the end of 2016. *See Loo v. Loo*, 520 N.W.2d 740, 745 (Minn. 1994) (noting that district court loses jurisdiction over maintenance after last payment).

Absent a reservation of jurisdiction, decisions on modifying maintenance are subject to two provisions of Minn. Stat. § 518A.39, subd. 2 (2008):

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<sup>10</sup> In light of this decision, appellant’s argument that respondent’s child support obligation must be recalculated is moot.

<sup>11</sup> Appellant states in her brief that the district court “should have left its order open for further modification” but did not raise reservation of jurisdiction over maintenance to the district court.

(a) The terms of an order respecting maintenance . . . may be modified upon a showing of one or more of the following, any of which makes the terms unreasonable and unfair: (1) substantially increased or decreased gross income of an obligor or obligee; (2) substantially increased or decreased need of an obligor or obligee . . . .

....  
(d) On a motion for modification of maintenance, including a motion for the extension of the duration of a maintenance award, the court shall apply, in addition to all other relevant factors, the factors for an award of maintenance under section 518.552 that exist at the time of the motion.

But “[i]n the event of an award of temporary maintenance *with a reservation of jurisdiction*, a subsequent request to extend spousal maintenance would be based on the factors applicable to awarding maintenance in the first instance [i.e., Minn. Stat. § 518.552, subd. 1 (2008)], providing that the spouse seeking maintenance must either show a lack of sufficient property to provide for reasonable needs or be unable to provide adequate self-support through appropriate employment], not the standards for a modification of spousal maintenance [i.e., Minn. Stat. § 518A.39, subd. 2(a) and (d)].” *Maiers*, 775 N.W.2d at 668 (emphasis added). *Maiers* concluded that “[t]he district court did not err by awarding [one spouse] temporary spousal maintenance for five years and reserving jurisdiction over the issue whether spousal maintenance should be extended beyond that five-year period.” *Id.* at 670.

Therefore, if the district court reserves jurisdiction over appellant’s maintenance for further consideration at the end of 2016, when payments cease, appellant will need to show only that she either lacks enough property to provide for her reasonable needs or cannot provide adequate self-support through appropriate employment, *see* Minn. Stat. § 518.552, subd. 1(a), (b); she will not need to show that her award has become

unreasonable and unfair because of a substantial increase or decrease in her or in respondent's gross income or needs, *see* Minn. Stat. § 518A.39, subd. 2(a)(1), (2). Given the number of indeterminate factors that may affect appellant's position after 2016, such as her mental health, her success in building her photography business or obtaining other employment, and the price for which the homestead will sell, she should not be obligated to meet the criteria of Minn. Stat. § 518A.39, subd. 2(a)(1) and (2). We therefore modify the maintenance award to reserve jurisdiction over whether maintenance should be extended beyond 2016.

## **2. Attorney Fees**

In a dissolution action, a district court shall award fees if it finds that the fees are necessary for a good-faith assertion of the right of the party seeking fees, the party seeking fees does not have the means to pay the fees, and the other party does have the means to pay them. Minn. Stat. § 518.14 (2008). An attorney fee award must be supported by specific findings. *Richards v. Richards*, 472 N.W.2d 162, 166 (Minn. App. 1991) (remanding for specific findings to support fee award “given the mandatory language in the statute, and the need for findings on the specific factors set forth in the statute”).

In her answer and counter petition, appellant requested attorney fees. Appellant submitted billing statements totaling \$34,589.42; the district court awarded her \$34,598, finding only that she “has incurred over \$34,598 in attorney’s fees [and] . . . is in need of assistance with her attorney’s fees” and that “[respondent] has the ability to contribute to [appellant’s] attorney’s fees.” No findings were made to support the necessity of the fees

to assert appellant's rights, and respondent challenges the award on this ground. Specifically, respondent objects to the bills for two attorneys attending the case management conference, two mediation sessions, and trial, because there was no necessity for two attorneys to assert appellant's rights. The record includes billing statements from appellant's attorneys for 30 April 2008 to 31 December 2008. They show that two attorneys attended and billed for the mediation conferences on 3 July 2008 and 28 July 2008 but that, while two attorneys attended a pre-trial conference on 9 December 2008, only one billed for it. Nothing appears regarding attorneys attending and billing for the January 2009 trial.

The record does not reflect any discussion, oral or written, of the fees, except that appellant testified that her father contributed \$7,500 to pay the retainer fee for her attorney. There is a question as to whether the father's contribution was a gift or a loan requiring repayment. Respondent also objects to paying this amount presumably on the ground that appellant has the ability to pay it. *See* Minn. Stat. § 518.14 (giving one party's inability to pay fees as a basis for fee award). In the absence of any explanation for a district court's decision to simply award the fee amount a party requests, this court will reverse and remand for further findings. *See, e.g., Geske v. Marcolina*, 624 N.W.2d 813, 819 (Minn. App. 2001) (reversing and remanding attorney fee award in dissolution action for "identification of the authority for the award, and the necessary findings"); *Courey v. Courey*, 524 N.W.2d 469, 473 (Minn. App. 1994) (reversing and remanding: "If attorney fees are warranted, the court's order must be accompanied by appropriate

findings.”); *Richards*, 472 N.W.2d at 166 (reversing and remanding attorney fee award because trial court failed to make specific findings).

The district court may, at its discretion, reopen the record for the sole purpose of obtaining additional evidence regarding the necessity of the award of \$34,598 to appellant for attorney fees to finance the assertion of her rights.

We affirm the spousal maintenance award as modified and reverse and remand the award of attorney fees.

**Affirmed in part, reversed in part, and remanded.**