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Minn. Stat. § 480A.08, subd. 3 (2006).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1000**

In re the Marriage of:
Sandra Jean Myrdahl,
n/k/a Sandra Jean Motzer, petitioner,
Appellant,

vs.

Daniel Keith Myrdahl,
Respondent.

**Filed July 1, 2008
Reversed
Hudson, Judge**

St. Louis County District Court
File No. 69-FX-03-600911

William D. Paul, 1217 East First Street, Duluth, Minnesota 55805-2402 (for appellant)

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Considered and decided by Toussaint, Chief Judge; Hudson, Judge; and Schellhas,
Judge.

UNPUBLISHED OPINION

HUDSON, Judge

On appeal from the district court's reduction of appellant-wife's spousal maintenance award, appellant argues that the district court (1) improperly based the reduction of maintenance on respondent-husband's possible future reduction in income;

and (2) failed to make adequate findings addressing the factors set forth in Minn. Stat. § 518.552 (2006). Because respondent's motion was premature in light of the lack of evidence showing a substantial change in circumstances rendering the existing spousal maintenance obligation unreasonable and unfair, we reverse.

FACTS

The marriage between appellant Sandra Motzer and respondent Daniel Myrdahl was dissolved in November 2005, after 17 years of marriage. At the time of the dissolution, appellant was employed at Whitehall Jewelers, Inc., and had an average gross monthly income of \$2,085.33 in 2003, and an average gross monthly income of \$1,810.86 in 2004. Respondent worked for the railroad, earning approximately \$112,000 in 2003, and \$108,376.31 in 2004. Pursuant to stipulated judgment, respondent was ordered to pay appellant permanent spousal maintenance in the amount of \$1,300 per month.

In February 2007, respondent moved for a decrease or termination of his spousal-maintenance obligation. In his supporting affidavit, respondent claimed that he was diagnosed with cancer, making "it difficult or near impossible to work." Respondent claimed that due to multiple surgeries pertaining to the cancer, he earned \$83,447.29 in 2006, which was substantially below his previous wages. According to respondent, the treatment and symptoms related to the cancer have made it "impossible" to return to earning his previous wages. Thus, respondent argued that there had been a substantial change in circumstances warranting a reduction in his spousal-maintenance obligation.

At a hearing on the matter, respondent requested that the district court provide "guidance" as to whether respondent would continue to be required to provide maintenance

if he retired. Respondent argued that his \$1,300 monthly spousal maintenance obligation would be unreasonable and unfair if he elected to retire. Respondent asserted that in light of his health situation and his desire to retire, the district court should eliminate his maintenance obligation. Respondent suggested that such an order could be “conditioned upon his retirement, and he would then proceed for retirement.” Appellant opposed the motion on the basis that the proposed reduction could not be considered based on what might happen in the future, and that the applicable law required the district court to consider only those circumstances that existed at the time of the motion.

The district court found that respondent was eligible for retirement, which, if he decided to retire, would reduce his monthly income to about \$3,000. The court also found that in light of respondent’s health status, he was “bringing this motion to help decide whether disability or regular retirement [was his] best option.” Based on respondent’s health, the court found that respondent established a substantial change in circumstances. Therefore, the district court ordered that respondent’s “permanent maintenance obligation is reduced to \$650 per month. Upon his election to retire or receipt of disability retirement it will be reduced to zero if [appellant] is eligible to apply for her portion of the previously divided pensions.” This appeal follows.

D E C I S I O N

A district court has broad discretion in deciding whether to modify a party’s maintenance obligation. *Kielley v. Kielley*, 674 N.W.2d 770, 775 (Minn. App. 2004), *review denied* (Minn. Sept. 28, 2005). This court will not disturb the district court’s decision concerning maintenance absent an abuse of that discretion. *Schallinger v.*

Schallinger, 699 N.W.2d 15, 22 (Minn. App. 2005), *review denied* (Minn. Sept. 28, 2005). Such an abuse of discretion occurs when the district court’s decision “is against logic and the facts on record.” *Kielley*, 674 N.W.2d at 775 (quotation omitted).

An order for maintenance may be modified upon a showing of, among other things, substantially increased or decreased gross income or substantially increased or decreased need of a party. Minn. Stat. § 518A.39, subd. 2(a) (2006). A party seeking modification must show not only a substantial change in circumstances, but also that the “change has the effect of rendering the original maintenance award both unreasonable and unfair.” *Beck v. Kaplan*, 566 N.W.2d 723, 726 (Minn. 1997).

Appellant argues that the district court abused its discretion in modifying respondent’s maintenance obligation because respondent failed to present any evidence that his income at the time he brought his motion was less than his income at the time of the dissolution. We agree. The record reflects that prior to 2006, respondent’s gross annual income was approximately \$110,000. When respondent moved to modify his maintenance obligation, he claimed that his gross annual income for 2006 had decreased to \$83,447.29. Respondent submitted his W-2 form for 2006 as support for his position that his income had substantially decreased and attributed his decrease in income to his cancer-related treatment that forced him to miss four months of work. But respondent submitted no additional evidence demonstrating that his income actually decreased. In fact, respondent conceded that his salary increased in 2006, and that his total income for 2006 decreased only because of the cancer-related surgeries.

Respondent argues that although his salary may have increased in 2006, his gross income decreased by more than 20%, which creates a presumption that there has been a substantial change in circumstances and the terms of the current support order are rebuttably presumed to be unfair. *See* Minn. Stat. § 518A.39, subd. 2(b)(5) (2006); *see also* Minn. Stat. § 518A.26, subd. 21(a)(3) (2006) (including order for maintenance in statutory definition of “support order”). Respondent contends that because this decrease in income will continue in the future due to more cancer-related surgeries, the district court properly found a substantial change in circumstances warranting modification of his maintenance obligation.

We acknowledge that respondent’s health situation has substantially impacted his ability to function on the job. But at the time of the motion, respondent was still employed working the same job, for the same salary, as he was at the time of the dissolution. Without more evidence establishing a substantial change in circumstances that is permanent, respondent’s motion is prospective in nature. Therefore, the district court abused its discretion in reducing respondent’s maintenance obligation to \$650 per month.

Appellant also challenges the district court’s decision to eliminate respondent’s maintenance obligation upon respondent’s election to retire. Appellant argues that rather than basing the decision on a present change in circumstances, the district court granted respondent’s motion to modify based on a possible *future* change in circumstances—respondent’s retirement. Appellant contends that because respondent has not yet retired, the district court’s decision to modify maintenance is premature.

We agree. At the hearing, respondent requested that the district court eliminate his maintenance obligation conditioned upon his retirement. Specifically, respondent's attorney stated:

Based upon that amount of money to continue to pay maintenance in the amount of \$1,300 would be unreasonable and unfair and he is, therefore, coming to the Court now seeking guidance by allowing or entering an order that would eliminate the maintenance responsibility. It could be conditioned upon his retirement, and he would then proceed for retirement. The process is not a simple thing where overnight you get the retirement. It's a longer process with the railroad lately; and therefore, he is seeking that guidance to know where he stands So, therefore, our motion is to request elimination of the maintenance . . . on that condition.

In *Catania v. Catania*, 385 N.W.2d 28, 29 (Minn. App. 1986), wife spent 31 years of a 32-year marriage as a homemaker. When the dissolution decree was entered, the district court awarded wife \$1,400-per-month spousal maintenance for six years. *Id.* at 30. On appeal, wife claimed that the district court abused its discretion by not retaining jurisdiction over maintenance at the end of that period so as to determine the success of her rehabilitation plans. *Id.* This court held that “[a]t any time before maintenance terminates, the trial court may address the issue of whether a continuation of maintenance is appropriate under the circumstances, or whether appellant has become or ever will become self-sufficient. A review of the duration of the maintenance award is thus premature under these facts.” *Id.*

We conclude that the language set forth in *Catania* is applicable here. Respondent had not retired at the time he filed his motion, nor had a retirement date been set. Instead, respondent's motion was based, at least in part, on his assertion that he might retire in the

near future. However, Minnesota law provides that “[w]hether there is a substantial change in circumstances rendering an existing support obligation unreasonable and unfair generally requires comparing the parties’ circumstances at the time support was last set or modified to their circumstances *at the time of the motion to modify.*” *Maschoff v. Leiding*, 696 N.W.2d 834, 840 (Minn. App. 2005) (emphasis added). Because respondent’s retirement is a circumstance that had not yet occurred at the time of the motion to modify, the district court’s decision to eliminate respondent’s maintenance obligation “[u]pon his election to retire” was premature.

Appellant also argued that the district court’s findings failed to sufficiently address the factors set forth in Minn. Stat. § 518.552 (2006). Because we are reversing the district court’s modification of appellant’s spousal-maintenance award, we need not address appellant’s argument. We note that if circumstances change, such as respondent’s actual retirement, respondent is free to bring a motion at that time for a modification of his spousal-maintenance obligation. But on this record, we conclude that the district court’s decision to modify respondent’s maintenance obligation was an abuse of discretion.

Reversed.