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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1395**

In re the Marriage of:
Elaine Irene Lee, petitioner,
Respondent,

vs.

Raymond Michael Lee,
Appellant.

**Filed July 9, 2012
Affirmed
Rodenberg, Judge**

Washington County District Court
File No. 82F392000592

Robert L. Weiner, Robert L. Weiner Law Offices, Minneapolis, Minnesota (for respondent)

Timothy W.J. Dunn, St. Paul, Minnesota (for appellant)

Considered and decided by Rodenberg, Presiding Judge; Halbrooks, Judge; and Ross, Judge.

UNPUBLISHED OPINION

RODENBERG, Judge

After almost 25 years of marriage, Elaine and Raymond Lee divorced in 1993. There have been several rounds of post-decree litigation concerning the award of permanent spousal maintenance. This is the parties' third appeal to this court. Most

recently, the supreme court remanded this case to the district court to make factual findings to support its November 2006 order that modified spousal maintenance and made the modification retroactive. On remand, the district court awarded Elaine \$669 per month in spousal maintenance retroactive to May 1, 2006, and it awarded her need-based attorney fees. But it denied the parties' requests for prospective modification of the spousal maintenance award. Raymond appeals, arguing that the district court did not comply with the supreme court's remand instructions which required factual findings to support the spousal maintenance modification and retroactive modification date. He also contends that the district court abused its discretion by awarding need-based attorney fees to Elaine and by denying his request for prospective modification of the spousal maintenance award. Because the district court complied with the remand instructions and did not abuse its discretion either by awarding attorney fees to Elaine or by denying the motions for prospective modification of the maintenance award, we affirm.

FACTS

Elaine and Raymond Lee were married on September 4, 1968, and were divorced on June 7, 1993, by a partially stipulated decree of dissolution. As a part of the decree, the district court awarded Elaine \$650 per month in permanent spousal maintenance.

From 1999 to November 2003, during which time Raymond's maintenance obligation had been reduced to \$341 per month, Raymond made no spousal-maintenance payments to Elaine. In February 2004, on motion by Elaine for modification, the district court retroactively reinstated the \$650 per month maintenance obligation, and increased the obligation to \$825 per month retroactive to November 1, 2003, resulting in an

arrearage which Raymond was ordered to pay. The district court found that Raymond had a net monthly income of \$2,491 and reasonable monthly expenses of \$2,100, and found that Elaine had a net monthly income of \$647 and monthly expenses of \$1,950. Raymond appealed to this court, and we affirmed. *Lee v. Lee*, No. A11-1070, 2005 WL 949038, at *5 (Minn. App. 2005).

On July 13, 2005, Raymond moved the district court to amend the February 2004 order and to terminate his spousal maintenance obligation. Raymond argued that there had been a substantial change in circumstances since the February 2004 order because he had retired and his income had been reduced, and Elaine's income had increased because she was collecting pension benefits.

After a hearing in August 2006, at which the district court did not have current and reliable evidence of any changes in the parties' reasonable needs since 2004,¹ the district court issued its order relying on the parties' 2004 expenses and their alleged changes in income. The district court found that Raymond's net monthly income was \$3,227 and his expenses were \$2,100. Elaine's net monthly income was \$1,674 and she had monthly expenses of \$1,950. She was left with a shortage of \$275 per month while Raymond had a surplus of \$1,127. It found that Raymond had demonstrated that a substantial change in circumstances had occurred since the February 2004 order. It reduced Raymond's spousal maintenance payment from \$825 to \$700 per month retroactive to May 1, 2006,

¹ See footnote 2 below, discussing the unfiled affidavit of Elaine Lee which was inexplicably unavailable to the district court at the time of the hearing.

based on “the surplus and shortages of each party.” It also held that each party could afford to pay their own attorney fees. Raymond appealed.

This court affirmed in part and reversed in part. *Lee v. Lee*, 749 N.W.2d 51, 62 (Minn. App. 2008). We reversed the \$700 maintenance obligation and ordered that it be reduced to zero and we changed the retroactive date from May 1, 2006 to July 13, 2005, the date of Raymond’s modification motion. *Id.* at 60. Elaine appealed to the supreme court and her petition for review was granted.

The supreme court affirmed this court’s decision in part, reversed it in part, and remanded the case to the district court with instructions to “reexamine the maintenance award . . . and make appropriate findings to support the current maintenance award or a different maintenance award should the circumstances have changed” because Elaine was awarded more than she reasonably needed to support herself. *Lee v. Lee*, 775 N.W.2d 631, 642, 643 (Minn. 2009). The supreme court also held that the district court must make factual findings to support the retroactive date of the modification. *Id.* at 642–43.

After the remand, Elaine moved the district court to award her spousal maintenance consistent with the supreme court’s remand, to issue findings of fact supporting its choice of an effective date for the modification, and for an award of attorney fees and costs incurred for the legal proceedings after the remand. Raymond moved the district court to deny Elaine’s requests for relief, to deny any award of spousal maintenance, to set the retroactive date to July 13, 2005, and for judgment against Elaine for overpayment of maintenance, and for an order that each party pay his or her own

attorney fees. Both parties moved for prospective modification of the 2006 order based on a claimed substantial change in circumstances.

After a hearing, the district court issued its order making further factual findings, denying prospective modification of spousal maintenance, and awarding Elaine need-based attorney fees. The district court found that Elaine had monthly expenses of \$2,177 and Raymond had \$2,300 in monthly expenses. It also found that Elaine and Raymond had net monthly incomes of \$1,508 and \$3,277, respectively. The district court relied upon an August 2006 affidavit from Elaine setting forth her income and expenses, which the district court had previously failed to file.² The district court found that there had been a substantial change in circumstances under Minnesota Statutes section 518A.39 (2010) rendering the 2004 award unreasonable and unfair because Elaine's income had substantially increased. The district court then determined that, based on the statutory factors in Minnesota Statutes section 518.552 (2010), Elaine's spousal-maintenance award should be \$669 per month. The district court also held that May 1, 2006 was the appropriate effective date of the modification. But it found that the parties had not demonstrated a substantial change in circumstances since 2006 to warrant prospective modification. The district court awarded Elaine \$8,000 in need-based attorney fees.

Raymond appealed the order to this court on December 16, 2010. Less than a month later, Elaine moved the district court for amended findings or a new hearing.

² Elaine had timely served an affidavit dated August 8, 2006 on opposing counsel, setting forth her income and expenses. The affidavit was submitted to the district court but for unknown reasons the district court never filed the affidavit. The August 8, 2006 affidavit will herein be referred to as the "unfiled 2006 affidavit."

Elaine also filed a motion with this court to either dismiss the direct appeal and notice of related appeal as premature, or to stay the processing of the appeal pending the district court's ruling on her motion. We agreed and dismissed the direct appeal and notice of related appeal as premature.

The district court issued its amended order in June 2011. Among other things, it amended the findings of fact and adjusted Elaine's reasonable monthly expenses upward from \$2,177 to \$2,203, and it adjusted Raymond's net monthly income downward from \$3,227 to \$2,969. It also awarded Elaine additional need-based attorney fees in the amount of \$2,400 in connection with the motion to amend. The district court changed its prior conclusion that Raymond could afford to pay the need-based attorney fees in part because he had a "monthly surplus," and instead concluded that Raymond could pay the attorney fees "given his income, interest income, and substantial amount of real and personal property."

Raymond appeals.

D E C I S I O N

I.

Raymond argues that the district court did not comply with the supreme court's remand instructions because it did not make adequate findings to support its modification of the spousal maintenance award or its choice of the retroactive modification date. We review a district court's decision to modify a maintenance award for an abuse of discretion. *Hecker v. Hecker*, 568 N.W.2d 705, 709 (Minn. 1997). The district court abuses its discretion if it modifies a maintenance award without findings of fact that are

supported by the record or if it improperly applies the law. *Dobrin v. Dobrin*, 569 N.W.2d 199, 202 (Minn. 1997). A district court’s findings of fact will be upheld unless they are clearly erroneous. *Gessner v. Gessner*, 487 N.W.2d 921, 923 (Minn. App. 1992); Minn. R. Civ. P. 52.01.

On remand, it is the district court’s duty “to execute the mandate of [the supreme court] strictly according to its terms.” *Halverson v. Vill. of Deerwood*, 322 N.W.2d 761, 766 (Minn. 1982). The supreme court remanded this case to the district court to “make appropriate findings to support the current maintenance award or a different maintenance award should the circumstances have changed” and to “make factual findings to support its choice of an effective date.” *Lee*, 775 N.W.2d at 643.

A. Spousal maintenance

Raymond contends that the district court did not comply with the supreme court’s remand instructions to make factual findings to support its spousal-maintenance modification. We disagree.

The district court may modify a spousal maintenance award if the spouse seeking the modification establishes that there has been a substantial change in circumstances since the most recent modification. Minn. Stat. § 518A.39, subd. 2(a). To establish that there has been a substantial change in circumstances, the spouse seeking the modification must show that one spouse has had a significant increase or decrease in gross income or a significant increase or decrease in need, and must further demonstrate that the change renders the current maintenance award “unreasonable and unfair.” *Id.*; *Hecker*, 568 N.W.2d at 709. Once the district court determines that there has been a substantial

change in circumstances warranting a modification, as the district court did here, it must apply the factors under Minnesota Statutes section 518.552 to determine the amount of the maintenance award. Minn. Stat. § 518A.39, subd. 2(d). Under Minnesota Statutes section 518.552, subdivision 2, the district court must consider

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

(b) the time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment, and the probability, given the party's age and skills, of completing education or training and becoming fully or partially self-supporting;

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

(d) the duration of the marriage and, in the case of a homemaker, the length of absence from employment and the extent to which any education, skills, or experience have become outmoded and earning capacity has become permanently diminished;

(e) the loss of earnings, seniority, retirement benefits, and other employment opportunities forgone by the spouse seeking maintenance;

(g) the ability of the spouse from whom maintenance is sought to meet needs while meeting those of the spouse seeking maintenance; and

(h) the contribution of each party in the acquisition, preservation, depreciation, or appreciation in the amount or value of the marital property, as well as the contribution of a spouse as a homemaker or in furtherance of the other party's employment or business.

Raymond disputes the amount of maintenance awarded to Elaine. He contends that the district court did not comply with the remand by making findings to support its award of maintenance in excess of Elaine's needs. The district court's November 2006 order awarded Elaine \$700 in spousal maintenance when her need was only \$275 per month, without addressing the required statutory factors in section 518.552. But in its November 2010 order, following the remand, the district court made findings regarding Elaine's income and expenses based on the unfiled 2006 affidavit. The district court found that Elaine's reasonable monthly expenses are \$2,177 and her income is \$1,508, leaving a shortfall of \$669. It also engaged in a lengthy analysis of the statutory factors in section 518.552. The district court then determined that the maintenance award should be \$669 per month. This award was not in excess of her needs. The district court therefore complied with the supreme court's remand by making factual findings to support its \$669 spousal maintenance award to Elaine.

The district court's extremely thorough findings are supported by evidence in the record. The district court did not abuse its discretion by modifying the maintenance obligation to \$669.

Raymond next argues that the district court failed to make any findings regarding the parties' expenses. He maintains that the district court found in its June 2011 order that his 2006 expenses are \$2,300, \$200 more than the 2004 finding but far less than he had documented in 2006 and 2010, and that the district court did not make any findings to support this conclusion. The district court based its 2006 finding that Raymond's monthly expenses were \$2,100 on the 2004 order because Raymond had not submitted

reliable evidence of his reasonable monthly needs. In November 2010, after the remand, the district court found Raymond's expenses to be \$2,300 per month, despite his claim that his expenses for 2006 were \$3,595 and for 2010 were \$6,838. The district court found that Raymond's claimed expenses in 2006 and 2010 were "far in excess of that set forth in prior orders" and, after reviewing his expenses and the parties' middle class standard of living during the marriage, it determined that Raymond's 2006 reasonable monthly expenses to be \$2,300. The district court further explained in the June 2011 order that it had "consider[ed] the standard of living established during the marriage, [Raymond's] historical expenses over the various past orders, and the questionable necessity of his claimed expenses" to arrive at \$2,300. It also noted that "it was simply incredible that [Raymond] incurred such lofty expenses given his net monthly income." The district court complied with the supreme court's remand by making specific findings to support its conclusion that Raymond's monthly expenses are \$2,300, and the findings are supported by the record.

Raymond asserts that the district court was required to make particularized and itemized findings regarding his expenses so that he and this court can know with precision which of the expenses were allowed and considered by the district court. The district court must make "sufficiently detailed findings of fact to demonstrate its consideration of all factors relevant to an award of permanent spousal maintenance." *Stich v. Stich*, 435 N.W.2d 52, 52 (Minn. 1989). But it is not required to specifically itemize each expense. Because the district court's findings regarding Raymond's

expenses are sufficiently detailed to demonstrate that it properly considered the statutory factors, it was not required to further itemize his expenses.

Raymond also contends that the district court did not make sufficient factual findings in its November 2010 order to support its conclusion that Elaine has monthly expenses of \$2,177. This argument also fails.

The district court considered Elaine's unfiled 2006 affidavit in its November 2010 order. In that affidavit, Elaine had itemized all of her monthly expenses for a total of \$2,177. The district court found that Elaine's budget was reasonable and well within the standard of living established during the marriage because her budget was consistent with her budget in the 1993 judgment and decree, as adjusted by the consumer price index, she lives in publicly subsidized housing, and she spends everything she receives on reasonable necessities. The district court's findings are supported by the record, including the unfiled 2006 affidavit, and are sufficient to sustain the court's conclusions.

Raymond also argues that the district court failed to explain why Elaine's expense amount increased from \$2,177 to \$2,203 in the amended order of June 2011. But Elaine explained in her motion for amended findings that she had previously understated her expenses by \$25 due to an error in addition. The district court accepted this explanation as accurate and the record supports that finding. The district court therefore complied with the supreme court's instructions on remand to make factual findings to support its modification of the spousal maintenance award and its findings are supported by the record.

B. Retroactive date

Raymond contends that the district court also failed to make findings supporting its choice of a retroactive date of May 1, 2006. We disagree.

Under Minnesota Statutes section 518A.39, subdivision 2(e), a modification of maintenance “may be made retroactive only with respect to any period during which the petitioning party has pending a motion for modification but only from the date of service of notice of the motion on the responding party.” The district court has discretion to determine the retroactive date for a modification, provided that the date chosen is within the statutory limits and is “based on the facts as found by the district court.” *Lee*, 775 N.W.2d at 643; *see also Kemp v. Kemp*, 608 N.W.2d 916, 920 (Minn. App. 2000) (holding that “[b]ecause the word ‘may’ is defined as ‘permissive,’ [in section 518A.39] a district court has discretion to set the effective date of a maintenance modification”).

In the district court’s November 2006 order, it stated that Raymond’s maintenance obligation was reduced effective May 1, 2006 without an explanation as to why it chose that date. After the supreme court remanded the case to the district court to make factual findings, the district court found that May 1, 2006 is the proper effective date because: (1) there was an “extremely long delay” (nearly one year) between when the motion was served and when it was finally heard; (2) “given [Elaine’s] limited resources, it would be particularly inequitable to impose upon her the burden of having to make such a repayment [of overpaid maintenance];” and (3) Raymond was “clearly able to make the spousal maintenance payments while the motion was pending.” The district court therefore complied with the supreme court’s remand by making specific findings to

support its choice of May 1, 2006 as the retroactive date. Those findings are supported by the record and reasonably support the retroactive date selected by the district court.

Raymond maintains that the retroactive date should be July 13, 2005, the date when the motion was served, and that May 1, 2006 has no procedural significance. But because the retroactive date was within the statutory parameters and the district court supported its selection of an effective date for the retroactive modification with specific findings, it did not abuse its discretion by making the modification effective May 1, 2006. *See Kemp*, 608 N.W.2d at 920–21 (holding that the district court did not abuse its discretion by setting March 1, 1999 as the retroactive date when a motion was served in December 1998, filed in February 1999, and heard in March 1999).

Raymond also contends that the district court attributed to him the delay between when the motion was served and when the hearing occurred. His assertion in this regard is simply incorrect. The district court did not assign blame for the delay to either party. The district court found that the delay, not the fault of either party, was a relevant consideration in determining the retroactive date, and the district court’s consideration of that delay was appropriate under the circumstances.

II.

Raymond argues that the district court erred by awarding Elaine need-based attorney fees.

The supreme court has stated that an appellate court reviews a district court’s award of attorney fees for an abuse of discretion. *Gully v. Gully*, 599 N.W.2d 814, 825 (Minn. 1999). By statute, the district court “shall” award a party attorney fees if the fees

are necessary for the party's good faith assertion of her rights, if the other party has the means to pay them, and if the requesting party does not have the means to pay the fees. Minn. Stat. § 518.14, subd. 1 (2010).

The district court awarded Elaine \$8,000 in need-based attorney fees in its November 2010 order. She had requested attorney fees in the amount of \$13,771 for fees incurred after the remand. The district court found that Elaine did not have the means to pay for \$8,000 of her attorney fees, that the fees were necessary for the assertion of her rights, and that Raymond had the ability to pay the fees given his "monthly surplus" and substantial amount of real and personal property.

In the district court's June 8, 2011 order, it also awarded Elaine additional need-based attorney fees in the amount of \$2,400 in connection with her motion to amend. She had requested \$3,375 in attorney fees, but the district court found that she could pay \$975 and that Raymond had the ability to pay \$2,400 "given his income, interest income, and substantial real and personal property." In the district court's 2010 order, it had mistakenly relied upon what it thought to be Raymond's "monthly surplus" of available income over reasonable monthly expenses as a factor supporting the award of attorney fees. The district court corrected this erroneous reference to "monthly surplus" in its June 2011 order.

Raymond argues that, because the district court found in its November 2006 order that the parties had the ability to pay their own attorney fees, he should not be required to pay Elaine's attorney fees. But Raymond's argument fails because the district court's

award of attorney fees in its November 2010 and June 2011 orders was based on the litigation that occurred *after* the supreme court's remand of the 2006 order.

Raymond also contends that he does not have the ability to pay the attorney fees as the district court found and that Elaine has not demonstrated a need for such fees. But the record supports the district court's conclusion that Elaine has a need, as she has very limited financial resources. The record similarly supports the district court's conclusion that Raymond has the ability to assist in the payment of Elaine's fees and costs.

The district court's otherwise thorough findings in its 2010 and 2011 orders are not ideal regarding the issue of Raymond's ability to pay Elaine's need-based attorney fees. Both the 2010 and 2011 orders made conclusory statements about Raymond's ability to pay Elaine's attorney fees. The 2010 order stated that Raymond had the ability to pay "given his monthly surplus . . . and his substantial amount of real and personal property." In the 2011 order, while the district court correctly deleted any reference to Raymond's "monthly surplus" because it had reduced his monthly net income [and eliminated] any surplus,³ it still stated in a conclusory fashion that Raymond's "income, interest income, and substantial amount of real and personal property" indicated that he has the ability to pay a portion of Elaine's fees. The district court did not identify the income or assets to which it was referring.

We are particularly deferential to the district court's exercise of its discretion with respect to attorney fees in dissolution cases. "An award of attorney fees in dissolution

³ The district court did not consider the \$795.64 of each monthly pension payment received by Raymond that represents marital property previously awarded to him in considering his ability to pay need-based attorney fees.

cases rests almost entirely within the discretion of the trial court and will not be disturbed absent a clear abuse of discretion.” *Jensen v. Jensen*, 409 N.W.2d 60, 63 (Minn. App. 1987); *see also Crosby v. Crosby*, 587 N.W.2d 292, 298 (Minn. App. 1998), *review denied* (Minn. Feb. 18, 1999).

A review of the record reveals that, in 2006, Raymond owned in his name alone assets valued substantially in excess of one million dollars, including:

- Bank accounts of over \$175,000
- A Franklin Fund account valued at \$47,968
- An Investment Centers of America account valued at \$74,331
- IRA, Roth IRA and “Supplemental Retirement” with a total value of over \$140,000; and
- Joint bank accounts with his current wife [with] a value over \$350,000.

Raymond also made gifts in 2005 to his current wife totaling \$115,000 (not included in the joint accounts identified above), \$50,000 of which was characterized as a “wedding gift.”

Then in February 2010, Raymond identified in signed discovery responses that he owned a “home” in Mora, Minnesota jointly with his current wife that was valued at over \$200,000 and was unencumbered. He also listed real estate in Woodbury, Minnesota, owned jointly with his current wife, which was subject to a life estate in favor of Raymond’s stepfather, with Raymond indicating that his remainderman’s interest had a value of \$446,912. In these same discovery responses, Raymond indicated that he owned other assets jointly with his current wife, including the following:

- Savings and other bank/credit union accounts totaling over \$15,000
- A Franklin Fund account valued at \$50,860
- An American Mutual Fund account valued at \$82,300
- An Investment Center of America account valued at \$74,239; and
- Stocks and mutual funds valued at over \$94,000.

The district court did not make findings as to which, if any, of the accounts in existence in 2010 were traceable to Raymond's assets and which, if any, of the accounts were traceable to his current wife's contributions. Nevertheless, the district court had available to it information generated over a number of years regarding these parties. This case has been the subject of intermittent litigation before this same district court judge over a number of years. That the district court was thoroughly familiar with these parties and with their financial conditions is reflected in the district court's otherwise extremely thorough and detailed findings. On this record, and despite the district court's findings not having been as detailed in this particular regard as might be preferable, we are unable to conclude that the district court's conclusion that Raymond had the ability to contribute toward Elaine's fees was an abuse of discretion. *Jensen*, 409 N.W.2d at 63.

III.

Raymond lastly argues that the district court abused its discretion by not prospectively modifying the spousal-maintenance award because there has been a substantial change in circumstances since 2006 rendering that order unreasonable and unfair. Raymond contends that the prior spousal-maintenance award is unfair because his monthly expenses have increased as a result of the fact that he has been diagnosed with

diabetes and prostate cancer. We review a district court's denial of a motion to modify a maintenance award for an abuse of discretion. *Hecker*, 568 N.W.2d at 709–10.

Here, there has not been a substantial change in circumstances since the 2006 order. Raymond himself testified that he has not received medical care for his diabetes or prostate cancer since 2006, that the conditions do not give him problems on a day-to-day basis, and that he does not take any medications for these conditions but instead relies on diet and exercise to control the diseases. Based on these facts, the district court did not abuse its discretion by denying the motion to prospectively amend the maintenance obligation.

Affirmed.