

*This opinion will be unpublished and may not be cited except as provided by Minn. Stat. § 480A.08, subd. 3 (2006).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A08-0149**

Ronald Lessard, petitioner,  
Appellant,

vs.

Kathleen Lessard,  
Respondent.

**Filed December 23, 2008  
Affirmed  
Kalitowski, Judge**

Olmsted County District Court  
File No. 55-F6-90-002455

Jill I. Frieders, O'Brien & Wolf, L.L.P., 206 South Broadway, Suite 611, P.O. Box 968, Rochester, MN 55903-0968 (for appellant)

Barbara A. Swisher, Swisher Law Firm, 201 23rd Avenue Southwest, Suite 102, Rochester, MN 55902 (for respondent)

Considered and decided by Kalitowski, Presiding Judge; Peterson, Judge; and Halbrooks, Judge.

**UNPUBLISHED OPINION**

**KALITOWSKI**, Judge

Appellant Ronald Lessard challenges the district court's denial of his motion to modify his spousal maintenance obligation. Appellant argues that the district court (1) made findings regarding his monthly reasonable expenses that are clearly erroneous; (2)

abused its discretion in awarding \$1,000 per month in spousal maintenance to respondent because it leaves him with a monthly shortfall and requires him to invade his property settlement; and (3) abused its discretion in awarding \$2,000 in attorney fees to respondent. We affirm.

## D E C I S I O N

### I.

Appellant argues that the district court clearly erred in calculating his reasonable monthly expenses because it subtracted a \$1,054 monthly mortgage payment from appellant's claimed expenses. We disagree.

“Findings of fact concerning spousal maintenance must be upheld unless they are clearly erroneous.” *Gessner v. Gessner*, 487 N.W.2d 921, 923 (Minn. App. 1992); *see* Minn. R. Civ. P. 52.01 (stating that findings of fact “shall not be set aside unless clearly erroneous”). And findings of fact are clearly erroneous when they are “manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole.” *Tonka Tours, Inc. v. Chadima*, 372 N.W.2d 723, 726 (Minn. 1985). A party challenging findings must show that despite viewing the evidence in the light most favorable to the district court's findings, the record still requires the definite and firm conviction that a mistake was made. *Vangsness v. Vangsness*, 607 N.W.2d 468, 474 (Minn. App. 2000). “That the record might support findings other than those made by the trial court does not show that the court's findings are defective.” *Id.*

The district court's order does not expressly state its reasons for subtracting the mortgage payment but evidence in the record supports the reduction. The record indicates that when the judgment and decree of dissolution was issued in 1992, the parties owned one home and the judgment and decree ordered the sale of that home with any surplus to be equally divided between the parties. Since that time, appellant has acquired a primary residence and a vacation home. In submissions to the district court appellant listed a \$1,054 mortgage payment expense that is for a vacation home to which he plans to move following retirement and after the sale of his primary residence. Appellant did not claim a mortgage expense for his primary home. The record also indicates that appellant owns rental property that he intends to sell because the property produces no income. Appellant submitted no evidence to the district court concerning the intended disposition of the proceeds received from any future sales of his primary residence and rental property.

We conclude that the proceeds from the sales of appellant's rental property and primary residence may affect the mortgage payment on his vacation home. Respondent, meanwhile, owns no real property and pays approximately \$200 per month in rent. The district court could have better explained why it disregarded the \$1,054 mortgage payment. But on this record, we hold that appellant failed to meet his burden to show that, viewing the evidence in the light most favorable to the district court's findings, the record requires the definite and firm conviction that a mistake was made.

Appellant also argues that the district court clearly erred by attributing one-half of his claimed expenses to his current spouse. We disagree.

It is not error for a district court to discount an obligor's expenses that may be attributed to a new family. *See Peterka v. Peterka*, 675 N.W.2d 353, 358 (Minn. App. 2004) (concluding that although the statute does not forbid consideration of extra-statutory factors, the district court erroneously considered obligor's expenses associated with obligor's new family in its determination of obligor's ability to pay maintenance). Appellant argues that his expenses would be the same regardless of whether his wife lives with him. But appellant's affidavit offered in support of his motion to modify spousal maintenance refers to "[o]ur present and projected monthly living expenses . . . ." (Emphasis added.) Thus, it was not clear error for the district court to conclude that appellant's claimed expenses accounted for both appellant and his wife.

The record shows that the district court examined the statutory factors, concluded that appellant inflated his monthly expenses, concluded that his expenses were for two people, and divided those expenses. On this record, appellant has not met his burden to show that the district court's findings are manifestly contrary to the weight of the evidence.

## II.

Appellant argues that the district court abused its discretion by awarding spousal maintenance in an amount that leaves him with a monthly shortfall and that requires him to invade his property settlement. We disagree.

An appellate court reviews a district court's maintenance award under an abuse-of-discretion standard. *Dobrin v. Dobrin*, 569 N.W.2d 199, 202 (Minn. 1997). A district court abuses its discretion regarding maintenance if its findings of fact are unsupported

by the evidence or if it improperly applies the law. *Id.* at 202 & n.3 (citation omitted). The district court must review the matter in a manner “that is against both logic and the facts on the record.” *Ganyo v. Engen*, 446 N.W.2d 683, 686 (Minn. App. 1989).

“Once an obligor establishes he is entitled to modification, the needs of the spouse receiving maintenance must be balanced against the financial condition or ability to pay of the spouse providing maintenance.” *Kemp v. Kemp*, 608 N.W.2d 916, 921 (Minn. App. 2000). Neither party challenges the district court’s determination that appellant’s retirement constitutes a substantial change in circumstances. Consequently, the inquiry turns to the district court’s balancing of the needs and abilities of the parties.

### **Monthly Shortfall**

Appellant argues that the district court abused its discretion by awarding respondent spousal maintenance that leaves him with a monthly shortfall, and relies on *Lee v. Lee*, 749 N.W.2d 51 (Minn. App. 2008), for support. But the *Lee* court did not conclude as a matter of law that an award resulting in the obligor having a monthly shortfall is an abuse of discretion. *See Lee v. Lee*, 749 N.W.2d 51, 62 (Minn. App. 2008) (concluding instead that the district court erred in awarding maintenance that would require obligor to liquidate his property settlement), *review granted* (Minn. June 25, 2008). Furthermore, reading *Lee* as appellant suggests would conflict with other decisions by this court that have concluded that a district court does not abuse its discretion merely by imposing a maintenance award that leaves an obligor with a monthly shortfall. *See Ganyo*, 446 N.W.2d at 687 (\$201 shortfall); *Buhr v. Buhr*, 395

N.W.2d 433, 436 (Minn. App. 1986) (\$75 shortfall). And *Lee* did not purport to overrule either *Ganyo* or *Buhr*.

Here, the record reflects that without spousal maintenance support, respondent faces a monthly shortfall of \$1,632.80. In contrast, with the modified \$1,000 maintenance award, appellant's shortfall is \$567.50 and respondent's shortfall is \$632.80. Based on this record we cannot say the district court's conclusion is against both logic and the facts on record. Therefore, we conclude that the district court did not abuse its discretion in balancing the needs and abilities of the parties.

### **Invasion of Property Settlement**

Appellant's pension was divided between the parties as property in the judgment and decree. Appellant receives a pension payment of \$2,257.16 per month, while respondent receives a pension payment of \$902 per month. The district court found that appellant's income is \$2,093 per month, not including any pension payments. And the district court found that appellant has \$1,660.50 per month in reasonable expenses. Appellant argues that the \$1,000 spousal maintenance award requires him to invade his property settlement because his maintenance obligation coupled with his expenses exceeds his income, and therefore, the district court abused its discretion in granting the award. We disagree.

Pension benefits awarded as marital property are not available for maintenance payments. *Kruschel v. Kruschel*, 419 N.W.2d 119, 123 (Minn. App. 1988). In *Kruschel*, upon retirement, an obligor moved to modify the spousal maintenance provision of a dissolution decree entered while he was still employed. *Id.* at 120-21. The district court

denied this motion on the grounds that the obligor failed to demonstrate a change of circumstances rendering the original award unreasonable. *Id.* at 121. Relevant to this case, *Kruschel* states:

In determining the propriety and amount of continued maintenance, the trial court must consider [the maintenance obligee's] total financial resources, including any income from [the obligee's] own marital property award . . . . Conjointly, [the maintenance obligor's] total financial resources must be considered in evaluating his ability to meet [the obligor's] own needs. If the court determines that [the maintenance obligor] has the financial resources to meet his own needs and [the maintenance obligee] does not, it may order continued maintenance out of [the maintenance obligor's] non-pension income.

*Id.* at 122-23. The court in *Kruschel* remanded for a recalculation of maintenance that did not include the appellant's pension benefits as income stating, "however, his property interest in the pension may . . . be considered in determining the propriety or amount of future maintenance payable from non-pension income." *Id.* Thus, under *Kruschel*, pension benefits that were awarded in the dissolution decree as property may be considered in determining whether an obligor can support himself, but spousal maintenance may not be ordered to be paid from such pension benefits.

Here, appellant can meet his maintenance obligation without invading his pension benefits because his income is \$2,093 per month - substantially more than the \$1,000 maintenance award, and appellant is free to pay for his expenses from the remaining income or his pension. Thus, we conclude that the district court's modification of appellant's spousal maintenance obligation from \$1,362 per month to \$1,000 per month is not an abuse of discretion.

### III.

Appellant argues that the district court abused its discretion by awarding \$2,000 in need-based attorney fees to respondent. We disagree.

An award of attorney fees rests almost entirely within the discretion of the district court and will not be disturbed absent an abuse of discretion. *Crosby v. Crosby*, 587 N.W.2d 292, 298 (Minn. App. 1998), *review denied* (Minn. Feb. 18, 1999). An award of need-based attorney fees is proper when a district court finds (1) that the fees are necessary for the good-faith assertion of the party's rights in the proceeding and will not contribute unnecessarily to the length and expense of the proceeding; (2) that the party from whom fees are sought has the means to pay them; and (3) that the party to whom fees are awarded does not have the means to pay them. Minn. Stat. § 518.14, subd. 1 (2006).

Here, with support from evidence in the record, the district court found that respondent met the statutory requirements and awarded respondent \$2,000 out of her total incurred attorney fees of \$3,295. We conclude that the district court did not abuse its discretion in awarding respondent attorney fees.

**Affirmed.**