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**STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1352**

In re the Marriage of: Kathleen Denice Luethmers, petitioner,
Respondent,

vs.

Alan James Luethmers,
Appellant.

**Filed May 12, 2014
Affirmed in part, reversed in part, and remanded
Hooten, Judge**

Stearns County District Court
File No. 73-FA-11-5258

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respondent)

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Considered and decided by Bjorkman, Presiding Judge; Johnson, Judge; and
Hooten, Judge.

UNPUBLISHED OPINION

HOOTEN, Judge

Appellant-husband challenges the district court's award of permanent spousal
maintenance and attorney fees to respondent-wife. We affirm the district court's grant of
spousal maintenance. But because the district court clearly erred in calculating wife's

expenses, we reverse the amount and duration of maintenance. The district court also abused its discretion by failing to make adequate findings as to husband's income and wife's award of attorney fees. We remand for necessary findings.

FACTS

In October 2010, respondent-wife Kathleen Luethmers petitioned to divorce appellant-husband Alan Luethmers. In June 2012, the district court ordered husband to pay wife \$1,200 in temporary monthly spousal maintenance. Based on the parties' partial marital termination agreement, the district court dissolved the marriage in November 2012. Husband was ordered to pay wife \$62,500 as a property settlement within 90 days of the bifurcated judgment and decree and \$1,354 for wife's share of tax refunds within 10 days. Husband agreed to continue paying for wife's medical insurance, which totaled \$320.19 per month at the time, for 36 months. The parties agreed that the unresolved issues of spousal maintenance and attorney fees incurred after April 10, 2012, would be decided based on affidavits and other documentary evidence.

Husband and wife married in 1998 and had no children together. At the time of the divorce proceedings, husband was 42 years old and wife was 43. Husband worked during the marriage and is a mechanic for a trucking company. Husband testified, and his paystub confirms, that he earns \$74,984 in gross annual income. According to his paystub, husband earns \$49,938.20 in net annual income. Husband admits that his current income is based on a 60-hour work week, but he states that if he were working 40 hours per week, his gross annual income would be \$49,920 and his net annual income would be \$32,952.

Wife has a high school education and also worked during the marriage. She held various part-time retail and custodial positions and is currently working part-time at a grocery store, earning \$8 per hour. According to wife, she began suffering from severe depression and incurable functional movement disorder (FMD) around 2002. Her FMD causes her to involuntarily move her arms and legs in a rapid and “jerky” manner. She continues to take medication for depression, and she began taking medications for the FMD, though they were unhelpful. According to a vocational expert, wife’s “symptoms are significantly limiting in [her] capacities to engage in work activity.” The expert opined that wife’s “employability is complicated by ongoing issues related to her” FMD and that wife “would not be a candidate for formal retraining in a post-secondary academic setting.” The parties stipulated that wife has a potential earning capacity of \$1,390.79 per month.

In March 2013, the district court determined that wife “will never be self-supporting” due to her health conditions and limited vocational skills and training. The district court further determined that wife “has struggled to live comfortably on her own” and “has racked up credit card debt and depleted her marital assets.” The district court found wife’s monthly expenses to be \$3,504. The district court awarded wife \$2,150 per month in permanent spousal maintenance and \$8,000 in need-based attorney fees. The district court noted that husband had failed to pay five months’ worth of temporary spousal maintenance, the property settlement, and the tax refunds.

Husband moved the district court to, among other things, amend wife’s monthly expenses from \$3,504 to \$2,069 and revoke the grant of need-based attorney fees. In

May 2013, the district court amended wife's monthly expenses to \$3,680. The district court also amended the permanent spousal maintenance award to \$1,900 per month, which includes husband's cost of maintaining wife's medical insurance. The district court added a finding that husband's "failure to promptly perform the settlement agreement has resulted in the occurrence of conduct based [attorney] fees." The district court recharacterized the \$8,000 need-based attorney-fee award as both need-based and conduct-based.

Wife brought a second motion for amended findings, arguing that her monthly expenses should be \$2,971 and that the first amended findings were "lacking in specificity and can easily be attacked." In July 2013, the district court denied the motion, reasoning that "based on the record presented, it is believed that the [f]indings have the appropriate support."

Husband appeals.

D E C I S I O N

I.

Husband challenges the district court's grant of spousal maintenance to wife, as well as the amount and duration of that award. "A district court generally has broad discretion in its decisions regarding spousal maintenance. The standard of review in spousal-maintenance determinations is whether the district court abused its discretion by improperly applying the law or making findings unsupported by the evidence." *Melius v. Melius*, 765 N.W.2d 411, 414 (Minn. App. 2009) (citation omitted). "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). The party challenging factual 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). A district court also abuses its discretion if its factual findings are not sufficiently detailed. *Stevens v. Stevens*, 501 N.W.2d 634, 637 (Minn. App. 1993).

A. Grant of spousal maintenance

A district court “may grant a maintenance order” if the spouse seeking maintenance

(a) lacks sufficient property, including marital property apportioned to the spouse, to provide for reasonable needs of the spouse considering the standard of living established during the marriage, especially, but not limited to, a period of training or education, or

(b) is unable to provide adequate self-support, after considering the standard of living established during the marriage and all relevant circumstances, through appropriate employment.

Minn. Stat. § 518.552, subd. 1 (2012).

Husband argues that the district court erred by granting maintenance because wife has managed financially during the dissolution proceedings without temporary maintenance and is capable of meeting her expenses with the property settlement. A maintenance recipient, however, is “not required . . . to invade the principal of the [recipient’s] property to pay living expenses.” *Lee v. Lee*, 775 N.W.2d 631, 640 n.10 (Minn. 2009). Moreover, the district court found that wife has depleted her marital assets and has struggled to live comfortably on her own. The district court also accounted for

wife's health issues and limited vocational skills, concluding that she "will probably never have income greater than her potential earning capacity" and "will never be self-supporting." Accordingly, because the district court properly considered the factors set forth in Minn. Stat. § 518.552, subd. 1, we affirm the grant of spousal maintenance.

B. Amount and duration of spousal maintenance

A district court must consider eight relevant factors in deciding the amount of spousal maintenance and whether to award it on a permanent basis. Minn. Stat. § 518.552, subd. 2 (2012). One factor is "the ability of the spouse from whom maintenance is sought to meet needs while meeting those of the spouse seeking maintenance." *Id.*, subd. 2(g). Husband argues that the district court clearly erred in its finding regarding the amount of wife's monthly expenses and failed to make adequate findings as to husband's income. We agree with both of these assertions.

Turning first to wife's monthly expenses, the district court found:

[Wife's] monthly living expenses will be approximately \$3,680.00. This amount takes into account the change in [wife's] prescription drug cost (approximately \$802 per month in out-of-pocket costs), but does not include the cost of [wife's] health and dental insurance. Since [husband] pays that amount, it [does] not exist as an expense to [wife].

We first note that neither the district court nor the parties have articulated the district court's steps in calculating \$3,680 as wife's monthly expenses. Based on the record, it appears that the district court started its calculation using wife's expense schedule, which provided line-item expenses and stated total expenses of \$3,824. From there, the district court apparently subtracted \$320 for wife's medical insurance paid by husband and then

replaced the \$675 for wife's prescription drug expense with \$802, effectively adding \$127 to the total. Finally, the district court added \$50 to reach approximately \$3,680.

This calculation is flawed on numerous levels. First, the district court failed to subtract from wife's expenses \$660 for the monthly debt repayment that she agreed to assume under the marital termination agreement. In fact, in her motion for second amended findings, wife admitted that the debt repayment should be excluded from her expenses and requested the district court to exclude it. Second, we find no evidence of the increase in wife's monthly prescription drug expense from \$675 to \$802. The only part of the record that hints at this increase is counsel's statement in wife's motion for second amended findings indicating that wife's prescription drug expense is \$802 per month. But this statement has no evidentiary support, and the arguments of counsel are not evidence. *Cf. State ex rel. Sime v. Pennebaker*, 215 Minn. 75, 77–78, 9 N.W.2d 257, 259 (1943) (holding that counsel's affidavit attesting to facts known by party was without evidentiary worth because it was obviously founded on mere hearsay). Third, although we cannot be sure why the district court added \$50 to wife's total expenses, the evidence shows that her prescription drug expense is \$50 with insurance coverage, rather than \$675 or \$802 without insurance coverage. So it appears that the district court recognized this true out-of-pocket cost and added \$50 to wife's expenses. But in doing so, the district court double-counted the prescription drug expense by adding both \$50 and the unsupported amount of \$802. Finally, we note that neither party requested the district court to increase wife's expenses from its original finding of \$3,504. But despite motions from both sides to reduce this amount, the district court increased it to \$3,680. Because

of these errors, we are left with the definite and firm conviction that the district court clearly erred in calculating wife's expenses.

We are also unable to review the district court's finding on husband's income. In determining whether a spouse has the ability to pay spousal maintenance, a district court "must make a determination of the payor spouse's net or take-home pay." *Kostelnik v. Kostelnik*, 367 N.W.2d 665, 670 (Minn. App. 1985), *review denied* (Minn. July 26, 1985). Here, in both its original and amended orders, the district court made only one finding regarding husband's income: "For several years [husband] has earned roughly \$70,000-\$75,000 annually. His current annual salary is \$74,984.00, but he also receives bonuses several times per year."

The district court failed to clarify whether these amounts are gross or net figures and whether these amounts are based on a 40- or 60-hour work week. It appears that the finding is for husband's gross income from a 60-hour work week because it is consistent with husband's testimony to that effect. It also appears, however, that the district court might have used net income in calculating the monthly maintenance because it originally awarded \$2,150, which is exactly the amount calculated by wife's financial expert who based her calculation on husband's net income from a 60-hour work week. But the district court modified the maintenance award from \$2,150 to \$1,900 without articulating its rationale. So although we recognize some evidence suggesting that the district court used net income and rejected husband's argument that his income should be based on a 40-hour work week, we simply cannot be sure without specific findings.

Even wife seems to agree that the district court made insufficient findings when she moved to amend the first amended findings because they lack specificity and “can easily be attacked.” And before us now, wife argues that the district court correctly used husband’s gross income because husband never provided the district court with evidence on taxes. This argument implicitly suggests that wife believed that the district court failed to use net income in determining maintenance. Contrary to wife’s assertion, there was evidence in the record regarding husband’s federal and state income tax liabilities, including husband’s testimony, husband’s paystub, and wife’s expert’s analysis. Without adequate findings demonstrating that the district court considered this evidence, we cannot effectively review the district court’s finding on husband’s income and we must remand. *See Stevens v. Stevens*, 501 N.W.2d 634, 637 (Minn. App. 1993) (stating that “the failure to make specific findings compels a remand”).

Because the district court clearly erred in calculating wife’s expenses, it abused its discretion by awarding \$1,900 in monthly permanent spousal maintenance. The district court also abused its discretion by failing to make necessary findings as to husband’s income. We remand for the district court to recalculate wife’s expenses, make specific findings on husband’s income, and determine the amount and duration of maintenance in light of these amended findings.¹

¹ Wife argues that the district court erred in calculating husband’s monthly expenses “without itemizing or demonstrating what the [c]ourt felt were specific reasonable expenses.” Although this argument appears to have merit, it is not properly before us because wife did not file a notice of related appeal. *See* Minn. R. Civ. App. P. 106; *Graves v. Wayman*, 816 N.W.2d 655, 669 (Minn. App. 2012).

II.

Husband also challenges the district court's grant of need-based and conduct-based attorney fees. A district court "shall" award need-based attorney fees "in an amount necessary to enable a party to carry on or contest the proceeding" if it finds (1) the fees are necessary for a good-faith assertion of rights; (2) the payor has the ability to pay the award; and (3) the recipient does not have the means to pay his or her own fees. Minn. Stat. § 518.14, subd. 1 (2012). Further, a district court "may" award conduct-based attorney fees "against a party who unreasonably contributes to the length or expense of the proceeding." *Id.*

Husband argues that the district court failed to make sufficient findings in its award of attorney fees. Wife argues that she is financially unable to pay attorney fees and that husband's "atrocious" conduct "clearly fits within the definition of conduct and need-based attorney's fees." As examples of such "atrocious" conduct, she refers to husband's failure to disclose certain income, overstatement of his expenses, and failure to pay temporary maintenance.

The district court's rationale for awarding attorney fees was:

[Husband]'s failure to promptly perform the settlement agreement has resulted in the occurrence of conduct based fees. [Wife] is also entitled to need-based attorneys' fees incurred subsequent to the [bifurcated judgment] in the amount of \$8,000.00 based upon her inability to generate employment income greater than the poverty guidelines.

We conclude, again, that the district court's findings are deficient. "Conclusory findings on the statutory factors do not adequately support a fee award." *Geske v.*

Marcolina, 624 N.W.2d 813, 817 (Minn. App. 2001). “The standards for making need-based and conduct-based fee awards are different;” therefore, a district court “must indicate to what extent the award was based on need or conduct or both.” *Id.* at 816. Here, the district court failed to do so by awarding one amount based on both need and conduct without differentiating between the two types of attorney fees.

Because we cannot tell what amount the district court awarded based on need, we cannot review whether such amount is necessary for wife to carry on the proceeding. While the district court addressed wife’s inability to pay her own fees, it failed to discuss, as required by Minn. Stat. § 518.14, subd. 1., whether the fees are necessary for wife to assert her rights and whether husband has the ability to pay the award. This error is compounded by the district court’s failure to make specific findings on husband’s net income.

Similarly, because the district court failed to make any findings as to the amount of attorney fees respondent incurred specifically to pursue husband’s compliance with the settlement agreement and failed to explain how such conduct-based attorney fees were calculated, we are unable to review the award of conduct-based attorney fees. Although wife submitted evidence that she incurred more than \$13,000 in attorney fees during the relevant time period, there is no delineation between attorney fees incurred in the pursuit of her spousal maintenance claims and her attempt to enforce husband’s compliance with the settlement agreement. Accordingly, based on this record and the district court’s lack of findings, we cannot review whether the award of conduct-based attorney fees is appropriate.

For all these reasons, the district court abused its discretion and we must remand also for necessary findings on wife's award of attorney fees. On remand, the district court has discretion to reopen the record.

Affirmed in part, reversed in part, and remanded.