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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0652**

Patrick A. Hopf, petitioner,
Appellant,

vs.

Nancy D. Hopf,
Respondent.

**Filed April 7, 2009
Affirmed
Kalitowski, Judge**

Hennepin County District Court
File No. 27-FA-000166620

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Considered and decided by Lansing, Presiding Judge; Kalitowski, Judge; and Schellhas, Judge.

UNPUBLISHED OPINION

KALITOWSKI, Judge

Appellant Patrick A. Hopf challenges the district court's denial of his motion for modification of his spousal maintenance obligation, arguing that the district court abused its discretion because it failed to recognize respondent Nancy D. Hopf's change in

circumstances that supported a modification. Appellant contends that the district court (1) failed to account for respondent's investment income; (2) failed to recognize that respondent has the ability and skills to earn a substantial salary; (3) failed to account for \$6,000 in monthly checks that respondent received from a male friend for 17 consecutive months; (4) failed to impute to respondent the income that she would have earned had she remained at her former place of employment; (5) mistakenly based the denial of the motion on appellant's continued financial success and ability to pay the support; and (6) failed to make sufficiently detailed findings of fact to demonstrate that it considered all relevant factors. Appellant also argues that the district court abused its discretion by awarding need-based and conduct-based attorney fees to respondent. We affirm.

D E C I S I O N

I.

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 record or if it improperly applies the law. *Id.* (citing *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988)). And “[f]indings 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”).

A modification of spousal maintenance is appropriate when a change in circumstances renders the original award “unreasonable and unfair.” Minn. Stat.

§ 518A.39, subd. 2(a) (2008). A substantial increase or decrease in the gross income of an obligor or obligee, or a substantial increase or decrease in the need of an obligor or obligee, are sufficient to show changed circumstances. *Id.*

Respondent's investment income

Appellant argues that the district court erred by failing to take into account respondent's investment income in determining whether there has been a change of circumstances. We disagree.

Minn. Stat. § 518.552, subd. 2(a) (2008), requires that the district court consider the “financial resources of the party seeking maintenance, including . . . the party’s ability to meet needs independently.” And a “spouse’s ability to pay maintenance does not, however, obviate the statutory mandate that the other spouse’s own independent financial resources must be considered too.” *Lyon v. Lyon*, 439 N.W.2d 18, 22 (Minn. 1989). In order to properly consider a spouse’s financial ability to pay, the court must determine that 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). Investment income is a factor to be considered by the district court in this analysis. *Kemp v. Kemp*, 608 N.W.2d 916, 921-22 (Minn. App. 2000); *Schreifels v. Schreifels*, 450 N.W.2d 372, 373 (Minn. App. 1990).

Here, the district court found that respondent “enjoys modest investment income, the highest amount being \$23,000 in 2006.” The district court concluded that the amount respondent receives from spousal maintenance, coupled with her investment income was insufficient to “meet her reasonable needs.”

Reports were submitted by both appellant's certified public accountant (CPA) and respondent's CPA regarding respondent's investment income. In calculating respondent's investment income, the district court relied on appellant's CPA report, which stated that in 2006, respondent had \$23,185 in total investment income. This amount is the highest amount listed in appellant's report.

Appellant argues that it was error for the district court to rely solely on the amount in the CPA's report because to calculate respondent's total investment income, the district court should have also considered the total wage equivalent value of the WGD, Inc. distributions held by respondent. After adding the amount of WGD, Inc. distributions in 2006 to the amount of total investment income in 2006, appellant contends that respondent's investment income for that year equals \$25,543 and that respondent received \$68,405 in investment income in 2004.

Whether a source of funds is income for purposes of determining an individual's support obligation is a question of law. *Sherburne County Soc. Servs. v. Riedle*, 481 N.W.2d 111, 112 (Minn. App. 1992). For both maintenance and child support purposes, income includes "any form of periodic payment to an individual." Minn. Stat. § 518A.29(a) (2008). And a bonus may be considered income if it provides a regular or dependable source of payments. *Desrosier v. Desrosier*, 551 N.W.2d 507, 509 (Minn. App. 1996). Because the WGD, Inc. distributions are an annual form of income, they are periodic payments and thus, should be considered when calculating respondent's investment income. Nevertheless, even if the wage distributions that respondent received are considered additional investment income, the record supports the district court's

determination that respondent's investment income, coupled with her spousal maintenance award, is insufficient to meet her reasonable needs.

Respondent's monthly projected budget is \$11,720 and her monthly spousal maintenance award is \$7,962. Thus, respondent's projected annual budget is \$140,640 and her projected annual income from spousal maintenance is \$95,544. Respondent, therefore, would need to average \$45,096 per year in investment income in order to meet her projected monthly expenses. Respondent's combined investment income, according to a report that includes WGD, Inc. distributions, is \$68,405 in 2004; \$19,593 in 2005; and \$25,543 in 2006. Thus, except for 2004, respondent's investment income falls far below \$45,096 and respondent would still be unable to meet her monthly expenses.

Because the district court properly determined that the amount of respondent's investment income plus her spousal maintenance did not satisfy her projected monthly expenses, we conclude that the district court properly found that appellant's investment income, coupled with her spousal maintenance was insufficient to meet her reasonable needs.

Respondent's ability to earn a substantial salary

Appellant asserts that the district court erred in determining that respondent lacked the ability to become self-supporting. We disagree.

The district court relied on respondent's vocational assessment, which showed that (1) respondent had no formal business training; (2) her situation at her former employer was unique; and (3) her earnings at her former place of employment increased substantially and beyond what could be expected for someone in an administrative

assistant position. The district court found that due to these factors and other social issues that could impact respondent's reentry into the workforce—age and gender bias, the lack of a business degree, and an 18-month absence from work due to her retirement—the only reasonably accessible job opportunities for respondent would be those “with earnings in the \$12 to \$16 hour range, consistent with wages offered to skilled office workers in the Twin Cities labor market.”

Appellant challenges the district court's conclusion based on respondent's employment with Jacobs Trading, Inc. (Jacobs) as an administrative assistant beginning in 1997. By 2003, respondent was earning an annual salary of approximately \$86,700 in this position. In 2003, respondent was given the title of vice president and her annual salary increased to over \$100,000, plus an annual bonus. Respondent retired from Jacobs in 2006. Appellant argues that it was unreasonable for the district court to conclude that respondent would only be able to find work as a skilled office worker after obtaining the title of vice president at Jacobs.

Because the vocational assessment supports the district court's findings that the only reasonably accessible job opportunities for respondent would be those consistent with wages offered to “skilled office workers in the Twin Cities labor market,” and that respondent lacked the ability to become self-supporting, we conclude that the district court's findings on this issue were not clearly erroneous.

Monthly checks from Bernard Benson

Appellant argues that because respondent had a serious relationship with Mr. Benson and received cash gifts from him, thereby improving her economic well-being,

the district court should have assigned the \$6,000 respondent received in monthly checks from Mr. Benson as income.

The district court categorized the \$6,000 monthly checks respondent received from Mr. Benson for approximately 17 consecutive months as “gifts” totaling \$55,000 in 2006 and \$48,000 in 2007. The district court found that the monthly checks were not income and because respondent and Mr. Benson were not in a marriage relationship, “[r]espondent could not rely on Mr. Benson for permanent support.” The district court also determined that because the relationship between respondent and Mr. Benson “has ended or has been significantly altered,” respondent could not depend on Mr. Benson for financial support in the future.

Minnesota caselaw has determined that although the mere existence of a meretricious relationship between a former spouse and her new partner is insufficient to justify termination or modification of spousal support, if that relationship improves the former spouse’s economic well-being, it should not be disregarded. *See Abbott v. Abbott*, 282 N.W.2d 561, 566 (Minn. 1979) (concluding that where “a former spouse’s need for support is reduced through [a meretricious] relationship, modification is appropriate”); *Sieber v. Sieber*, 258 N.W.2d 754, 758 (Minn. 1977) (concluding that a meretricious relationship is disregarded “except in so far as it might improve an ex-spouse’s economic well-being”); *Bissell v. Bissell*, 291 Minn. 348, 352, 191 N.W.2d 425, 427-28 (1971) (determining that the amount of gifts given to the former spouse by her new partner justified a reduction in spousal support). But whether the spouse’s economic well-being has been affected by this relationship must be shown before a spousal maintenance award

may be modified. *See Mertens v. Mertens*, 285 N.W.2d 490, 491 (Minn. 1979) (stating that without findings regarding appellant's financial status—specifically whether the meretricious relationship had ended and whether the relationship had improved her economic well-being—the spousal maintenance termination order could not stand); *see also Bissell*, 291 Minn. at 352, 191 N.W.2d at 427-28 (concluding that the gifts the former spouse received from her new partner constituted a change in circumstances to justify a reduction in spousal maintenance, in part, because the value of the gifts was approximately equal to the amount of money that the obligor paid in alimony over the same period of time).

The record indicates that Mr. Benson began giving respondent cash gifts to support her after she retired from her job in 2006. And respondent admitted that Mr. Benson's promise of monthly checks was a factor in her early retirement. However, during the proceedings, respondent submitted an affidavit stating that she and Mr. Benson never had any plans to marry, and because of the stress of this litigation, they had ended their relationship. Mr. Benson also testified during a deposition that he and respondent were no longer dating and that he stopped giving respondent monthly checks in August or September of 2007, before the close of this litigation. In support of appellant's assertions that respondent and Mr. Benson continued to date, appellant submitted a report from a hired private investigator that stated Mr. Benson on occasion still stays overnight at respondent's home and that he received mail at her residence.

The district court was required to make credibility determinations about the conflicting evidence regarding respondent's relationship with Mr. Benson. This court

defers to a district court's credibility determinations. *Sefkow*, 427 N.W.2d at 210; *Vangsness v. Vangsness*, 607 N.W.2d 468, 474 (Minn. App. 2000). The district court chose to give little weight to the private investigator report and instead, the district court relied on statements made by respondent and Mr. Benson concerning their relationship. And the district court ultimately found that, "[r]espondent testified that no future cash gifts are anticipated by Respondent and the Court believes this to be true."

Appellant relies on a Fifth Circuit case, *Hall v. Nat'l Gypsum Co.*, 105 F.3d 225 (5th Cir. 1997), in support of his argument that this court should not give significant deference to these credibility determinations because the district court viewed only documentary evidence on this issue, and not oral testimony. But Minn. R. Civ. P. 52.01 states that, "[f]indings of fact, *whether based on oral or documentary evidence*, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." (Emphasis added.) The credibility determination made by the district court based on documentary evidence, therefore, is given the same amount of deference that oral testimony would receive.

Because the district court credited respondent's assertions that respondent no longer receives checks and could not anticipate receiving monetary gifts from Mr. Benson in the future, the court's finding that the monthly checks are not income is not clearly erroneous.

Imputation of income to respondent obligee

Appellant argues that the district erred by failing to impute the wages that respondent would have earned if she had remained a vice president at Jacobs and by

assuming that respondent was entitled to retire without considering whether her early retirement was in bad faith. We disagree.

Respondent claims she left her job in anticipation of her position being eliminated. The district court reviewed affidavits from Howard Grodnik, respondent's direct supervisor at Jacobs, and the president of Jacobs, David Engel. Mr. Grodnik stated that respondent's position was eliminated, but Mr. Engel stated that respondent's decision to resign was voluntary. The district court determined that "[g]iven that Respondent did not have a duty to become self-supporting, this disputed fact is not important for the Court to resolve in deciding this case." The district court also found that, "respondent had no obligation under the permanent maintenance award to seek further employment."

Respondent had already been awarded a permanent spousal maintenance award at the time of her retirement from her executive position in 2006. And this court has held that a former spouse receiving permanent spousal maintenance does not have a duty to become self-supporting. *Cisek v. Cisek*, 409 N.W.2d 233, 237 (Minn. App. 1987), *review denied* (Minn. Sept. 18, 1987). Although appellant is correct that *Cisek* did not address this particular situation where a former spouse finds gainful employment that exceeds salary expectations, the *Cisek* holding is not limited to its specific facts. In *Cisek*, this court stated that "[g]enerally, an award of permanent maintenance does not imply an obligation by the spouse receiving it to become self-sufficient." *Id.*

Appellant improperly relies on *In re Marriage of Richards*, 472 N.W.2d 162, 165 (Minn. App. 1991), to support his position that respondent, as an obligee, must overcome a colorable claim of bad faith by showing that her early retirement decision was not

primarily influenced by a specific intent to maintain her spousal support. But the *Richards* case held that when a spousal maintenance obligor retires early, the obligor must overcome a claim of bad faith by showing that the decision to retire was not influenced by a specific intent to decrease or terminate maintenance. *Id.* at 165. There is no caselaw that supports appellant’s assertion that *Richards* applies to an obligee receiving permanent spousal maintenance who retires early.

Because respondent, as an obligee, did not have a duty to become self-supporting, we conclude that the district court did not err in determining that her reasons for early retirement are irrelevant. Nor did the district court err by declining to impute any income to respondent based on her past income or by declining to consider whether respondent’s retirement was in bad faith.

Appellant’s ability to pay

Appellant argues that the district court erred by denying his spousal maintenance modification motion based on whether appellant was able to pay the support, and not on whether respondent was in need of the support. We disagree.

After finding that respondent was unable to support herself, the district court found that appellant “has the means to pay continued spousal support.” “A spouse’s ability to pay maintenance does not . . . obviate the statutory mandate that the other spouse’s own independent financial resources must be considered too.” *Lyon*, 439 N.W.2d at 22. “Because maintenance is awarded to meet need, maintenance depends on a showing of need.” *Id.* Appellant relies on *Lyon* to assert that respondent failed to show

that she needs maintenance and therefore, the maintenance should not continue based solely on his ability to pay.

But *Lyon* is distinguishable. In *Lyon*, the obligee had received a \$3.6 million estate after the marriage dissolution and the court determined that this estate, coupled with a profit-sharing account and an IRA, would yield an annual return in excess of \$200,000. 439 N.W.2d at 21-22. Because the obligee was unable to show that she needed spousal maintenance to meet her annual living expenses of \$78,000, the maintenance award was terminated. *Id.* Here, respondent's annual projected expenses total \$140,640 and the only income respondent can depend on is her investment income, which is insufficient to meet her projected monthly expenses. Thus, respondent's investment income does not obviate her need for spousal maintenance. The district court found that respondent "has no current employment income and is dependent upon the permanent spousal maintenance she receives from [appellant] to pay her expenses." This finding was based on the evidence in the record.

Further, although the district court noted appellant's continuing ability to pay spousal maintenance in denying his motion to modify, the district court considered all relevant factors when determining the spousal maintenance award, including "the ability of the spouse from whom maintenance is sought to meet needs while meeting those of the spouse seeking maintenance," as required by Minn. Stat. § 518.552, subd. 2(g). And after first finding that respondent was in need of continuing spousal maintenance, the district court properly found that appellant was capable of paying the maintenance.

We conclude that the district court did not err in considering appellant's ability to pay when denying his motion for modification of spousal maintenance.

Findings of fact

Appellant argues that the district court erred by failing to make detailed findings about respondent's gross income and needs, particularly with regard to her expenses, and her investment income. We disagree.

When considering a motion to modify spousal maintenance, the district court must make findings that are sufficiently detailed to permit appellate review to determine whether the relevant statutory factors were considered. *Stich v. Stich*, 435 N.W.2d 52, 53 (Minn. 1989). A party seeking modification must not only show 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). When a district court denies a motion for modification of spousal maintenance, the findings are sufficient if they support the district court's determination that the party seeking the modification failed to show a substantial change in circumstances, as required by statute. *Tuthill v. Tuthill*, 399 N.W.2d 230, 232 (Minn. App. 1987). And "the district court is not required to make specific findings on every statutory factor if the findings that were made reflect that the district court adequately considered the relevant statutory factors." *Peterka v. Peterka*, 675 N.W.2d 353, 360 (Minn. App. 2004) (citing *Rosenfeld v. Rosenfeld*, 311 Minn. 76, 83, 249 N.W.2d 168, 172 (1976)). 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).

The district court found that although respondent's purported monthly living expenses of \$11,720 per month were "somewhat inflated," respondent's CPA report supports respondent's claim that she cannot meet her monthly needs, even with her current spousal maintenance of \$7,962 per month.

When considering modification, the district court applies the factors as they exist at the time of the motion. Minn. Stat. § 518A.39, subd. 2(d). The district court found that at the time of appellant's motion for modification, (1) respondent was unemployed and dependent upon the permanent spousal maintenance she received from appellant; (2) although respondent had a salary from 2002-2006, she no longer holds that job; and (3) although Mr. Benson had given respondent monthly checks in the past, they were never married and respondent could not anticipate such cash gifts in the future. The district court considered these factors before finding that respondent could not meet her expenses without spousal maintenance from appellant.

On this record, we conclude that these detailed findings support the district court's determination that appellant failed to show a substantial change in circumstances to warrant modification of his spousal maintenance obligation. Additionally, the findings that were made reflect that the district court adequately considered the relevant statutory factors.

We conclude that the district court's findings support its determination that there was not a substantial change in circumstances to warrant spousal maintenance

modification and that the district court did not abuse its discretion by denying appellant's motion for modification of spousal maintenance.

II.

Appellant argues that the district court abused its discretion in awarding respondent need-based and conduct-based attorney fees. We disagree.

In the context of reviewing an award of need-based attorney fees, the Minnesota Supreme Court has stated, “[t]he standard of review for an appellate court examining an award of attorney fees is whether the district court abused its discretion.” *Gully v. Gully*, 599 N.W.2d 814, 825 (Minn. 1999). Likewise, conduct-based attorney fee awards “are discretionary with the district court.” *Szarzynski v. Szarzynski*, 732 N.W.2d 285, 295 (Minn. App. 2007); *see* Minn. Stat. § 518.14, subd. 1 (2008).

Need-based fees

Appellant argues that the district court failed to apply the requisite three-part test before awarding need-based attorney fees to respondent. We disagree.

Minn. Stat. § 518.14, subd. 1, requires a district court to award need-based fees if it 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, costs, and disbursements are sought has the means to pay them; and

(3) that the party to whom fees, costs, and disbursements are awarded does not have the means to pay them.

Here, the district court awarded respondent \$20,000 in need-based attorney fees after determining that respondent did not unnecessarily contribute to the length or expense of the proceedings, that appellant had the means to pay respondent's attorney fees, and that respondent did not have the comparative means to pay her attorney fees. These findings were based on evidence in the record regarding both parties' respective financial situations. We conclude that these findings comport with the statutory three-part test and that the district court did not abuse its discretion by awarding need-based attorney fees to respondent.

Conduct-based fees

Appellant argues that the district court abused its discretion by awarding conduct-based attorney fees to respondent. We disagree.

Minn. Stat. § 518.14, subd. 1, permits the award of conduct-based fees "against a party who unreasonably contributes to the length or expense of the proceeding." The district court must make findings regarding conduct-based fees "to permit meaningful appellate review" of the propriety of an award. *Kronick v. Kronick*, 482 N.W.2d 533, 536 (Minn. App. 1992). Conduct-based attorney fees must be based on behavior occurring during the litigation, and the court must identify the specific conduct on which it bases the fee award. *Geske v. Marcolina*, 624 N.W.2d 813, 819 (Minn. App. 2001).

Here, the district court found that appellant had unreasonably contributed to the length of the litigation by disregarding court orders to comply with discovery, failing to provide complete discovery responses, and because respondent was forced to file a motion to compel in order to get complete discovery responses from appellant. The

district court determined that appellant's conduct caused respondent to unnecessarily incur attorney fees in excess of \$12,000 and awarded attorney fees to respondent in this amount.

Appellant asserts that there were other reasons for the delay in the proceedings that are not a result of his conduct: (1) after appellant objected to discovery requests, the proper manner for seeking review of the district court's decision was unclear; (2) respondent did not promptly agree to keep appellant's financial information confidential; (3) respondent delayed in producing discovery; and (4) Mr. Benson attempted to quash the subpoena that was served on him by appellant.

Appellant's alleged reasons for the delay are without support in the record. First, the record indicates that delays in the proceeding were caused by appellant's persistent refusal to fully comply with discovery orders. Although appellant's review of the district court decision resulted in a slight delay in compliance with discovery requests at the beginning of the litigation, this was not a continuing reason for his delays in compliance after the matter was resolved. Second, appellant's demand that respondent keep his financial information confidential was not a valid reason for his delaying the proceedings. The district court must consider an obligor's ability to pay as a factor in awarding or modifying spousal maintenance. Minn. Stat. § 518.552, subd. 2(g). Thus, financial information disclosure is required under the statute and appellant's attempts to avoid this requirement delayed the proceedings. Third, although respondent did delay in producing discovery, the record indicates that respondent substantially complied with all discovery requests, and appellant did not. Finally, Mr. Benson's attempt to quash the subpoena did

not unreasonably delay the proceedings because only two weeks passed from Mr. Benson's motion to quash the subpoena until the hearing wherein it was denied.

We conclude that the district court made sufficient findings pursuant to Minn. Stat. § 518.14, subd. 1, to permit appellate review of the conduct-based attorney fee award. The fee award was based on appellant's behavior that occurred during the litigation—specifically, appellant's delays in producing complete discovery. And the district court identified the specific conduct resulting in the award of attorney fees to respondent: that appellant gave incomplete discovery to respondent, contested respondent's discovery requests, and failed to respond to certain discovery.

Thus, the district court did not abuse its discretion by awarding \$20,000 in need-based and \$12,000 in conduct-based attorney fees to respondent.

Affirmed.