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STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1405

In re the Marriage of:
Jennifer Elen Vervoort-Smith, petitioner,
Appellant,

vs.

William Fred Smith,
Respondent.

Filed August 31, 2010
Affirmed in part, reversed in part, and remanded
Schellhas, Judge

Hennepin County District Court
File No. 27-FA-276827

James J. Vedder, Moss & Barnett, Minneapolis, Minnesota (for appellant)

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Considered and decided by Connolly, Presiding Judge; Stoneburner, Judge; and Schellhas, Judge.

U N P U B L I S H E D O P I N I O N

SCHELLHAS, Judge

Appellant challenges a reduction of her maintenance award, arguing that the district court abused its discretion in reducing her maintenance award because it did not consider appellant's income-tax liabilities. By notice of review, respondent argues that

the district court abused its discretion by (1) estimating appellant's reasonable needs instead of determining her actual reasonable needs, (2) denying respondent conduct-based attorney fees, and (3) denying respondent's motion to strike three of appellant's exhibits from the record. We affirm in part, reverse in part, and remand.

FACTS

The district court dissolved the marriage of appellant Jennifer Elen Vervoort-Smith and respondent William Fred Smith in October 2003, after a two-day trial that focused primarily on the amount and duration of spousal maintenance to be awarded. The court awarded Vervoort-Smith maintenance of $7,000 per month, to be reviewed in five years.

More than five years later, in May 2009, Vervoort-Smith moved the district court for an increase in maintenance to $7,581 per month. Smith moved for a decrease or termination of his maintenance obligation, sought conduct-based attorney fees because of Vervoort-Smith's failure to timely respond to discovery requests, and moved to strike three exhibits submitted to the court by Vervoort-Smith. The district court imputed earned and investment income to Vervoort-Smith, reduced her award of maintenance to $3,960 per month, denied Smith's motion for conduct-based attorney fees, and did not rule on his motion to strike.

This appeal follows.

D E C I S I O N

The 2003 dissolution judgment required a mandatory review of maintenance after five years but did not specify the scope of the review. The district court treated the parties' motions as motions for modification and relied on the findings and conclusions contained in the 2003 judgment.

I

Both parties argue that the district court abused its discretion in its reduction of Vervoort-Smith's maintenance. "Spousal maintenance is awarded when a party shows sufficient, reasonable need." *Kampf v. Kampf*, 732 N.W.2d 630, 633 (Minn. App. 2007), *review denied* (Aug. 21, 2007).

> Spousal maintenance is appropriate when the requesting spouse lacks sufficient property or is otherwise unable to provide adequate self-support for his or her reasonable needs in light of the standard of living established during the marriage. The district court considers a variety of factors when setting the duration and amount of an award of spousal maintenance, including (1) the petitioning spouse's ability to meet his or her needs independently; (2) the time necessary for the party seeking maintenance to acquire sufficient training or education to enable the party to find appropriate employment; and (3) the duration of the marriage and the standard of living established during the marriage, among other factors. No single factor is dispositive, and the district court must weigh the facts of each case to determine whether maintenance is appropriate.

Id. at 633-34 (citations omitted).

An appellate court reviews the district court's "analysis of the claims of substantial change to determine whether it carefully exercised its discretion in modifying the terms of the original judgment and decree." *Hecker v. Hecker*, 568 N.W.2d 705, 709 (Minn.

1997). "When a district court has discretion, it will not be reversed unless it abused its discretion, exercised its discretion in an arbitrary or capricious manner, or based its ruling on an erroneous view of the law." *Posey v. Fossen*, 707 N.W.2d 712, 714 (Minn. App. 2006) (quoting *Montgomery Ward & Co. v. Cnty. of Hennepin*, 450 N.W.2d 299, 306 (Minn. 1990)) (quotation marks omitted).

In this case, the district court referenced the following findings from the 2003 dissolution judgment that it deemed "germane to the matter":

> XXXVI.
>
> [B]ecause of [Vervoort-Smith's] lengthy absence from the job market, . . . if she re-enters the market in her apparel sales rep field, she would initially qualify for an entry level position with a starting annual gross income of $34,000; within five years she would likely earn $60,000 per year. . . .
>
> XXXVII.
>
> Although [Vervoort-Smith's] employment plans are uncertain or non-existent, the Court finds that she is capable of finding employment with which to contribute to her support. It does not appear that she has planned or pursued employment. She provided no information to [the expert vocational evaluators] about job pursuits; she did not indicate . . . a willingness to be employed. . . . With an aggressive job pursuit, [Vervoort-Smith] has the ability to earn at least $34,000 per year, which the Court will impute to her, with the likelihood of increases as she re-develops the necessary professional contacts and experience to "move up" in her field. Her future ability to support herself without maintenance is uncertain.
>
> XXXVIII.
>
> [Vervoort-Smith] requests permanent spousal maintenance of $15,000 per month; [Smith] proposes spousal maintenance of $4220 per month for five years, with a

> specific requirement that [Vervoort-Smith] pursue employment and report her income to [Smith]. [Vervoort-Smith] needs maintenance; her success in employment is uncertain; the Court will order permanent spousal maintenance with a mandatory review in five years, when [Vervoort-Smith] is likely to have increased earning and decreased need.

The district court added:

> 4. The 2003 Court found that $7000.00 in pre-tax spousal maintenance, employment income of $3000.00 per month and the "property awarded here" would meet [Vervoort-Smith's] needs. The order did not impute any investment income to [Vervoort-Smith] despite a cash award of approximately $538,000.00 and it did not include any of the $637.00 monthly child support in considering the amount of money available to [Vervoort-Smith] to meet her reasonable monthly expenses.
>
> . . . .
>
> 7. [Vervoort-Smith's] financial decisions since the divorce have been monumentally bad. She has squandered her money in a fashion that is shocking to the conscience. Relevant actions are summarized below.
>
> 8. [Vervoort-Smith] never sold the homestead as urged by the Court in 2003. Instead, she obtained multiple additional mortgages on the homestead, extracting over $800,000.00 in cash from the home. Now, she has no equity whatsoever in her home. Hence, instead of selling the home and using the equity (in excess of $300,000.00 at the time of the decree) to purchase a less expensive home, she now lives in a home which has little or no equity and has to pay more in monthly mortgage payments than she did at the time of the divorce due to the multiple post-decree mortgages. There is no accounting for where the hundreds of thousands of dollars have gone.
>
> 9. [Vervoort-Smith] made no meaningful search for a job that generates an income. The first year following the divorce, her income was positive but only because her

> spousal maintenance was greater than the losses on her business pursuits. Her only explanation for her worklife that year is that she was "engaged in art sales" that year. In 2005, her income was positive but again, only due to spousal maintenance more than covering her business losses. That year, she described her work as "engaged in a business selling out." In 2006, she opened her current business, Soleil Brule, which has lost so much money that her business losses now are greater than her spousal maintenance income, resulting in negative income. The current business—which sells imported home goods and accessories—has never made any money and she predicts it may never: in her words, "the business is not profitable at present and I am not sure when or if it ever will be."
>
> 10. The business is little more than an excuse to travel globally and buy pretty things with a man who is variously described as her boyfriend or her ex-boyfriend depending on the time period. The travel expenses of the travel companion are also borne by the company, contributing to the business's consistent failure to generate a profit.
>
> 11. It is reasonable to impute income to [Vervoort-Smith]—including both investment income and employment income.
>
> 12. The record does not provide any legitimate basis to disturb the 2003 court's determination that [Vervoort-Smith] could earn $60,000.00 per year within 5 years of the divorce—as her own vocational expert testified. [Vervoort-Smith's] continued failure to make any real effort to earn a reliable income in the intervening years constitutes an unjustified self-limitation of her income. In reality, the Court recognizes that [Vervoort-Smith] has not earned $60,000 per year but she has made no reasonable efforts to obtain gainful employment as set forth in Findings of Fact Nos. 9-10 above. The Court will impute $60,000.00 in employment income to [Vervoort-Smith].

(Footnote and citations omitted.)

The district court noted that Vervoort-Smith presented "no evidence as to how or whether she invested her cash settlement of over a half-million dollars," and that she conceded that she "should be presumed to earn some income from her cash settlement," and the court imputed investment income to her in the amount of $2,440 per month, based on a five percent return on $585,792,[1] a rate of return that Vervoort-Smith identified as reasonable.

The district court reduced Vervoort-Smith's spousal maintenance award to $3,960 per month based on her imputed earned income, imputed investment income, and her reasonable monthly expenses, which the court found to be $11,400.[2] The court rejected Vervoort-Smith's argument that maintenance should be adjusted upward to account for her estimated combined federal and state income tax liability, concluding:

> [T]here should be no adjustment based upon the tax treatment of the spousal maintenance, as [Vervoort-Smith] has argued. The original 2003 decree did not "gross up" the spousal maintenance award such that it resulted in $7,000 in after tax dollars; instead, it awarded $7,000 in pre-tax spousal maintenance. This Court will not disturb that approach on this review. The 2003 Court could legitimately have concluded that a pre-tax spousal maintenance award that brought her total pre-tax income, including imputed income, up to $10,000 per month was reasonable especially given its finding that the $10,000.00 monthly expense figure exceeded the parties' means during the marriage and a lower $8,000.00 monthly figure following a recommended sale of the home

[1] The district court used this figure as the settlement balance in October 2008, assuming that Vervoort-Smith had withdrawn the funds then from the S&P 500 equity fund.

[2] The district court determined the reduced award of maintenance as follows: $11,400 ("[r]easonable needs" per month), less $5,000 ("[i]mputed employment income" per month), less $2,440 ("[i]mputed investment income" per month) for a total of $3,960 ("[r]evised spousal maintenance amount" per month).

> would likely be [Vervoort-Smith's] "only way" to maintain her level of spending.

The district court also rejected Smith's argument that Vervoort-Smith's maintenance should be reduced or terminated because her need for maintenance had changed since the dissolution. Smith argued that Vervoort-Smith squandered her income, and since her mortgage was being foreclosed, any future rent or mortgage would be substantially less than her mortgage obligations on the homestead. The district court found:

> 28. The marital standard of living was established during the marriage, and ruled upon in the Conclusions of Law in the 2003 divorce and is not properly disputed at this juncture. [Vervoort-Smith]'s reasonable needs given that standard were set at $10,000 per month in 2003 or $11,400 adjusted for inflation. The 2003 Court did not find that [Vervoort-Smith]'s need for spousal maintenance would terminate at any point in the future; it only found that the need would likely decrease within 5 years given [Vervoort-Smith]'s job skills and the labor market.
>
> 29. There has been no relevant evidence presented by [Smith] at this time that [Vervoort-Smith's] need for spousal maintenance has dropped to zero. Instead, [Smith] has relied almost exclusively on evidence regarding [Vervoort-Smith's] squandering of her income. While the evidence is powerful, it is not legally relevant to the issue of permanence.

Vervoort-Smith does not challenge the district court's findings. Instead, she argues that the court abused its discretion in determining the amount of the spousal maintenance award and failing to consider the effect of income taxes on her taxable income, including employment income, investment income and spousal maintenance. Characterized another way, Vervoort-Smith argues that "the district court abused its

discretion by not considering her net after-tax income when determining the amount of spousal maintenance." Smith argues that the district court abused its discretion by finding Vervoort-Smith's monthly expenses to be $11,400, instead of determining her "reasonable needs" when reducing the amount of Smith's spousal-maintenance obligation.[3]

Imputation of Income without Imputation of Tax Liability

As quoted above, the district court concluded that the 2003 dissolution court did not consider net income and that it need not consider it in determining Vervoort-Smith's need for maintenance. Vervoort-Smith challenges the district court's reading of the 2003 dissolution judgment.

Whether a dissolution judgment is ambiguous is a legal question reviewed de novo. *Tarlan v. Sorensen*, 702 N.W.2d 915, 919 (Minn. App. 2005). A court has jurisdiction to interpret and clarify a judgment which is ambiguous or uncertain on its face, even after the time for appeal has passed. *See Stieler v. Stieler*, 244 Minn. 312, 318-19, 70 N.W.2d 127, 131 (1955) (holding that district court had jurisdiction to clarify and interpret dissolution judgment from two years before to determine whether court intended deceased ex-husband to have sole possession of government bonds). Such interpretation "involves neither an amendment of [the judgment's] terms nor a challenge to its validity."

[3] Smith argues on appeal that Vervoort-Smith improperly included in her appendix selected pages from calculations purportedly prepared and received at trial in 2003, but never made a part of the record before the district court in 2009. We have not relied on these documents and therefore deem Smith's argument moot and do not address it.

Id. If language is reasonably subject to more than one interpretation, there is ambiguity. *Columbia Heights Motors, Inc. v. Allstate Ins. Co.*, 275 N.W.2d 32, 34 (Minn. 1979).

Here, the district court determined that "[t]he original 2003 decree did not gross up the spousal maintenance award such that it resulted in $7,000 in after tax dollars; instead, it awarded $7,000 in pre-tax spousal maintenance. This Court will not disturb that approach on this review." Essentially, the district court determined that the language in the 2003 dissolution judgment was clear and unambiguous as to the approach taken by the dissolution court in determining Vervoort-Smith's need for spousal maintenance and decided to follow the same approach. We agree with the district court that no ambiguity exists in the language of the 2003 dissolution judgment and, therefore, we need not clarify the judgment.

Vervoort-Smith argues that even if the 2003 dissolution court did not consider her after-tax income in determining her need for spousal maintenance, the district court in the current proceeding erred by not doing so. We initially note that the dissolution judgment unambiguously stated that Vervoort-Smith was assumed to be able to earn $34,000 in "gross" income at that time. But the dissolution court did not label the $60,000, that it assumed Vervoort-Smith could earn five years later, as either gross or net income. If the dissolution court intended the figure to represent net income, this court would be remiss in reducing the net figure for taxes. In any event, for the following three reasons, we disagree with Vervoort-Smith's argument.

First, the record shows that Vervoort-Smith's business has always lost money, that she has not paid any income tax since at least 2005, that her 2009 business loss would be

more than her 2008 business loss, and that she carries over her business losses to future years for tax purposes, thereby offsetting any income that she receives, including spousal maintenance. Additionally, Vervoort-Smith's statements to the district court suggest that she has no intention of abandoning her business. Therefore, Vervoort-Smith's taxable income, including spousal maintenance, apparently will continue to be offset by her business losses, meaning that any error by the district court in failing to consider her tax liability is harmless because it is a failure to consider a $0.00 liability. *See* Minn. R. Civ. P. 61 (requiring harmless error to be ignored); *Midway Ctr. Assocs. v. Midway Ctr., Inc.*, 306 Minn. 352, 356, 237 N.W.2d 76, 78 (1975) (stating that, to prevail on appeal, an appellant must show both error and that error caused prejudice).

Second, Vervoort-Smith relies on *Schreifels v. Schreifels*, 450 N.W.2d 372 (Minn. App. 1990), to argue that the district court erred by not considering her after-tax income. *Schreifels*, which involves actual rather than imputed income, states that "[t]o properly consider the financial ability of a spouse, the court must determine the spouse's net or take-home income." 450 N.W.2d at 373 (citing *Kostelnik v. Kostelnik*, 367 N.W.2d 665, 670 (Minn. App. 1985), *review denied* (Minn. July 26, 1985)). But *Schreifels* also cites *Johnson v. Johnson*, 277 N.W.2d 208, 211 (Minn. 1979), for the idea that the district court's "net-income determination [was] within a 'reasonable range of figures'" and rejects the maintenance recipient's argument that the district court erred in determining her net monthly income from anticipated investment earnings. Therefore, if a district court's finding of income is within a reasonable range of figures, *Schreifels* does not

require a tax calculation. Here, because the finding of Vervoort-Smith's income is otherwise reasonable, *Schreifels* does not support Vervoort-Smith's argument.

Third, in *Hecker*, the supreme court approved attribution to a maintenance recipient of $30,400 in annual income, including $25,000 as an amount commensurate with a reasonable effort by the recipient to rehabilitate. 568 N.W.2d at 708-09. Doing so resulted in "an approximate *net* monthly income [for the recipient] of $1,825." *Id*. at 708 (emphasis added). The supreme court then affirmed a maintenance award of $1,375: the difference between the recipient's $1,825 "net monthly income" and her $3,200 in reasonable monthly expenses. *Id.* *Hecker*'s use of "net" income suggests that the attributed-income figure was a gross figure and that consideration of taxes was therefore proper.[4] *See American Heritage Dictionary of the English Language* 1214 (3d ed. 1992) (defining "net" as "[r]emaining after all deductions have been made"). Moreover, in *Hecker*, the district court had reason to believe that the recipient would have taxable earned income because since the dissolution she had become employed, and had improved her station while the proceedings were pending. *Id*. at 707 & n.1. Here, unlike in *Hecker*, whether the income attributed to Vervoort-Smith is gross or net is unclear and the record indicates that she does not have, and is not expected to have, taxable earned income. We are aware of no legal authority in Minnesota that requires a district court under these circumstances to impute a tax liability on imputed income for the purpose of

[4] The district court in *Hecker* appears to have deducted estimated taxes of approximately 28% of the gross monthly figure imputed to Sandra Hecker. The court found that Sandra Hecker had gross annual income of $30,400, or $2,533 per month. The difference between this gross figure and the "net" figure of $1,825 is $708, or approximately 28%.

determining the amount of a spousal maintenance award, and Vervoort-Smith concedes that she has found no such authority.

Based on the unique circumstances of this case, we will not reverse the district court's decision not to consider Vervoort-Smith's income-tax liability in determining her income and reducing her spousal-maintenance award.

Vervoort-Smith's Reasonable Needs

Minnesota Statutes section 518A.39, subdivision 2 (2008), "places a dual burden on the party seeking modification—first, to demonstrate that there has occurred a substantial change in one or more of the circumstances identified in the statute and second, to show that the substantial change has the effect of rendering the original award unreasonable and unfair." *Hecker*, 568 N.W.2d at 709 (discussing predecessor statute).

Changed circumstances that will justify modification include substantially increased or decreased income or expenses of either party. Minn. Stat. § 518A.39, subd. 2(a)(1). Determination of the requisite change of circumstances is a factual matter within the discretion of the trial court. *See Bissell v. Bissell*, 291 Minn. 348, 351, 191 N.W.2d 425, 427 (1971) ("It is obvious with respect to alimony the court may take into consideration a variety of factors. It is for this reason that this court is reluctant to reverse the trial court's determination on this issue unless the evidence clearly show that there has been an abuse of discretion."). An appellate court reviews the district court's "analysis of the claims of substantial change to determine whether it carefully exercised its discretion in modifying the terms of the original judgment." *Hecker*, 568 N.W.2d at 709. Factual findings will not be set aside unless they are clearly erroneous. Minn. R.

Civ. P. 52.01. Factual findings 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).

Smith argued in support of his motion to decrease his spousal-maintenance that Vervoort-Smith's reasonable monthly expenses had substantially decreased since the original award of maintenance because she was not making any mortgage payments on the homestead, which was in foreclosure, and because the children, who lived primarily with Vervoort-Smith and attended a private school, would soon be graduating from high school. Although Vervoort-Smith argued that she was "working with people" to avoid foreclosure on the homestead, she continued to live in the homestead and conceded that she was making no mortgage payments on the property. And Vervoort-Smith did not dispute that her child-related expenses would soon decrease.[5]

The district court did not address Smith's argument about Vervoort-Smith's reduced reasonable expenses. Instead, the district court noted that Vervoort-Smith's reasonable monthly expenses were $10,000 in 2003, according to the dissolution judgment, and determined that Vervoort-Smith's reasonable monthly expenses at the time of the modification hearing were $11,400, adjusted upward for inflation. Smith challenges the district court's determination of the maintenance award on the basis that the court did not properly consider Vervoort-Smith's reasonable needs. We agree.

[5] At the time of this appeal, the parties' two children have presumably graduated from high school. The eldest child was on track to graduate from high school in June 2009, and the youngest child was on track to graduate from high school in June 2010.

In a modification proceeding, the district court must compare the circumstances at the time of the motion to the baseline circumstances of the last award. *See Hecker*, 568 NW.2d at 709 (noting that a stipulated maintenance award identifies "baseline circumstances" against which future allegations of changed circumstances will be measured); *Maschoff v. Leiding*, 696 N.W.2d 834, 840 (Minn. App. 2005) (stating, in the child-support context, that "[u]nless a support order provides a baseline for future modification motions by reciting the parties' then-existing circumstances, the litigation of a later motion to modify that order becomes unnecessarily complicated because it requires the parties to litigate not only their circumstances at the time of the motion, but also their circumstances at the time of the order sought to be modified).

Here, the district court erred when it did not compare Vervoort-Smith's reasonable needs at the time of the motion to the reasonable expenses set forth in the 2003 dissolution judgment. By simply adjusting Vervoort-Smith's 2003 reasonable needs upward for inflation, the court essentially assumed that her reasonable needs had not changed since 2003. Because the district court's approach resulted in clearly erroneous factual findings, we reverse and remand. On remand, the district court should properly determine Vervoort-Smith's reasonable monthly needs at the time of her original motion and compare those needs to her needs set forth in the dissolution judgment. Based on that comparison, the district court must determine whether Vervoort-Smith has proved a substantial change in her needs and how her needs bear on the amount of Smith's spousal-maintenance obligation.

II

Smith argues that the district court abused its discretion by failing to grant his request for conduct-based attorney fees. "The 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). A district court *may* award conduct-based attorney fees against a party who unreasonably contributes to the length or expense of the proceeding. Minn. Stat. § 518.14, subd. 1 (2008); *Szarzynski v. Szarzynski*, 732 N.W.2d 285, 295 (Minn. App. 2007). A district court must "make findings revealing its rationale on the attorney fees issue." *Kronick v. Kronick*, 482 N.W.2d 533, 536 (Minn. App. 1992). Findings are "needed to permit meaningful appellate review on the question whether attorney fees are appropriate because of a party's conduct." *Id.* (citing *Moylan v. Moylan*, 384 N.W.2d 859, 863 (Minn. 1986)).

Smith states that "it is undisputed that [Vervoort-Smith] simply ignored her obligation to respond to discovery[,] which was originally served on January 19, 2009[,] . . . until April 13, 2009." But, at the maintenance modification hearing, the district court heard the parties' arguments regarding conduct-based attorney fees, and Vervoort-Smith argued that fees were not warranted because Smith's discovery requests were voluminous and contributed to the delay and because, at the time of the hearing, the parties had agreed upon a discovery deadline that had not yet passed. And Smith later acknowledged to the district court that Vervoort-Smith had provided discovery and that he was "satisfied with what was provided." Smith's assertion that the district court failed to make findings addressing his motion for conduct-based attorney fees is without merit. In

its second amended order modifying spousal maintenance, the district court specifically found that both parties "presented reasonable and good faith arguments in their respective motions." Based on our careful review of the record, we conclude that the district court did not abuse its discretion by denying Smith's motion for conduct-based attorney fees.

III

Smith argues that the district court erred by admitting into evidence three exhibits submitted by Vervoort-Smith, attached to her affidavit: (1) an analysis of Vervoort-Smith's projected investment income performed by a vice president at Merrill Lynch Global Wealth Management; (2) the vice president's opinion on Vervoort-Smith's investment income based on the analysis; and (3) a calculation of Vervoort-Smith's after-tax income including $7,581 in spousal maintenance. Smith objected to the exhibits and argues that the district court should have granted his motion to strike them from the record as inadmissible. The district court did not rule on Smith's motion to strike the exhibits and appears to have partially relied on the exhibits, thereby implicitly denying the motion.

Even if admission of the investment-income-analysis documents were error, the error was harmless because it actually *benefitted* Smith—the documents imputed a gross annual investment income of $29,280 to Vervoort-Smith when Smith had requested the district court impute only $18,600 in investment income. Because there was no harm to Smith in the district court's failure to strike the investment analysis and opinion on Vervoort-Smith's investment income from the record, Smith's arguments do not merit

reversal of the district court's decision to consider the exhibits. *See* Minn. R. Civ. P. 61 (stating that harmless error is to be ignored).

With respect to the third document, which Vervoort-Smith's attorney apparently created, Smith argues that the district court should have struck the exhibit because it constituted hearsay, lacked foundation, and violated Minn. R. Prof. Cond. 3.7, which generally prohibits a lawyer from being a witness in a case in which he or she is an advocate. But the exhibit—a chart containing financial calculations—plainly reflects that it condenses voluminous writings into a more convenient format. Therefore, it is admissible under Minn. R. Evid. 1006, which provides, in relevant part:

> The contents of voluminous writings . . . which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place.

Smith's foundation and hearsay arguments are baseless because he has never sought to examine or copy the underlying documents summarized by the exhibit, and Vervoort-Smith's affidavit, attached to the exhibit, indicates that Vervoort-Smith has direct knowledge of her finances and that the exhibit is an accurate summary constituting her own declaration of her finances. Smith's argument that the district court should have struck the exhibit under Minn. R. Prof. Cond. 3.7 lacks merit because Vervoort-Smith's attorney was never a witness in the case. *See* Minn. Stat. § 595.01 (2008) ("A witness is a person whose declaration under oath is received as evidence for any purpose, whether such declaration is made on oral examination, or by deposition or affidavit."). We

conclude that the district court did not abuse its discretion by implicitly denying Smith's motion to strike.

The district court did not abuse its discretion by modifying the maintenance award without imputing income taxes on Vervoort-Smith's imputed income, by denying Smith's motion for conduct-based attorney fees, or by denying Smith's motion to strike exhibits from the record. But because the district court erred in not determining Vervoort-Smith's current reasonable needs, we reverse and remand. The district court may reopen the record in its discretion.

Affirmed in part, reversed in part, and remanded.