STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1848

In re the Marriage of: Ranell Marie Davenport, petitioner,
Respondent,

vs.

David Allan Davenport,
Appellant.

Filed June 13, 2011
Affirmed
Larkin, Judge

Hennepin County District Court
File No. 27-FA-07-4795

Kristy A. K. Rodd, Fredrikson & Byron, P.A., Minneapolis, Minnesota (for respondent)

Thomas H. Boyd, Winthrop & Weinstine, P.A., Minneapolis, Minnesota (for appellant)

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

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

LARKIN, Judge

Appellant-husband challenges the district court's award of conduct-based attorney fees to respondent-wife, arguing that the record does not support the award. Because the

district court's award finds support in the record, the award was not an abuse of discretion, and we affirm.

FACTS

On February 24, 2010, respondent-wife Ranell Marie Davenport notified appellant-husband David Allan Davenport of an upward cost-of-living adjustment (COLA) to the child support and spousal maintenance amounts he is ordered to pay. On March 15, husband filed a motion contesting the COLA. Husband, a partner at a local law firm, represented himself in the majority of the proceedings relevant to this appeal.

On March 29, wife's counsel sent husband a letter requesting copies of his 2008 and 2009 federal tax returns and copies of his 2008 and 2009 law firm total compensation worksheets. Husband did not produce any of the requested documents. On April 5, wife's counsel served husband with a request for production of the following documents: copies of all check stubs received from all employers from January 1, 2010 to the present; copies of all personal tax returns for the years 2008 and 2009; copies of husband's shareholder distribution analyses from 2008 and 2009; copies of husband's law firm's year-end distribution checks from 2007, 2008, and 2009; copies of any and all financial statements, loan applications, or personal guaranties given to any corporation, bank, lending institution, or other entity during the past three years; copies of all contracts or plans under which husband receives benefits such as profit-sharing, pension, and stock-option plans; copies of all periodic statements regarding husband's law firm's cash-balance plan from January 1, 2008 to the present; copies of all periodic statements regarding husband's law firm's profit-sharing plan from January 1, 2008 to the present;

and copies of all periodic statements regarding husband's law firm's 401(k) plan from January 1, 2008 to the present.

Husband e-mailed wife's counsel objecting to the production of every document. He asked her to provide "legal support" for all of her requests and that she "meet-and-confer" with him before he filed his official discovery responses. On April 9, wife's counsel sent husband an e-mail stating, "I am willing to meet-and-confer with you after discovery has been exchanged and reviewed. I may have additional requests after reviewing your responses so we cannot schedule a specific date at this time." Husband responded that her unwillingness to meet in advance was "unfortunate," and in a later e-mail stated, "your discovery is clearly objectionable and I will serve responses when they are due. Your refusal to meet-and-confer could have prevented what is likely to follow . . . ."

On May 5, husband formally responded to wife's request for production of documents: he objected to every financial document requested. However, husband agreed to produce his 2008 and 2009 shareholder distribution analyses from his law firm, as well as his 2008 and 2009 tax returns, so long as wife would stipulate to a protective order. Husband objected to disclosure of every other financial document asserting that the requested disclosure was "not reasonably calculated to lead to the discovery of admissible evidence." Husband also requested a protective order and an opportunity to "meet-and-confer." In a letter dated the same day, wife's counsel informed husband that wife was willing to sign a mutually agreeable protective order, which would prevent the

disclosure of both parties' financial information. Wife's counsel asked husband to draft the protective order.

In a letter to husband dated May 7, wife's counsel explained why she had requested each financial document. The letter states, "this letter is my good faith attempt to secure the information we requested in discovery without filing a motion to compel." By letter dated May 10, husband sent wife's counsel a proposed protective order, but did not deliver any of the requested financial documents. On May 11, wife's counsel filed a motion to compel discovery.

On May 27, the district court held a hearing on husband's motion to prevent the COLA and wife's motion to compel discovery. At the hearing, husband and wife agreed to the terms of a protective order. The district court's order indicates that husband then gave wife "two pages of his 2009 tax returns, and his 2008 and 2009 Shareholder Distribution Analysis." Wife's counsel informed the district court that these documents were sufficient to enable her to address husband's motion to stop the COLA. At the end of the hearing, wife's counsel requested conduct-based attorney fees based on husband's discovery tactics.

The district court denied husband's challenge to the COLA, found that wife's motion to compel discovery had been rendered moot, and awarded wife $9,332 in conduct-based attorney fees. This appeal follows.

D E C I S I O N

A district court may grant conduct-based attorney fees "against a party who unreasonably contributes to the length or expense of the proceeding." Minn. Stat.

§ 518.14, subd. 1 (2010). 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). Conduct-based fee awards "are discretionary with the district court." *Szarzynski v. Szarzynski*, 732 N.W.2d 285, 295 (Minn. App. 2007).

The district court made the following findings in support of its award of conduct-based attorney fees: husband continually objected to wife's discovery requests for information related to husband's income; husband claimed he tried to "meet and confer" with wife's counsel to remedy the disagreement, but the court did not find this credible; after receiving husband's objections, wife's counsel sent husband a letter explaining why each discovery request was relevant and why his objections were improper; wife's counsel explained that she was not required to meet with husband in person to discuss the discovery requests and that the letter was her attempt to secure the relevant documents without further court action; the requested documents contained financial information that was "directly at the heart of the matter" because husband objected to the requested COLA; husband's conduct in this matter unreasonably contributed to the expense of the proceeding and increased wife's attorney fees; and based on a review of wife's counsel's invoices, husband's unreasonable conduct increased wife's fees by $9,332.

Contrary to husband's arguments, each of these findings is supported by the record. Husband did object to the production of every financial document and claimed that none of the documents, except perhaps his shareholder distribution analyses and tax returns, was "reasonably calculated to lead to the discovery of admissible evidence." We

disagree. The matter at issue was husband's motion to foreclose a COLA. He had the burden to demonstrate that the COLA should not be enacted, which required review of his income. *See Bartl v. Bartl*, 497 N.W.2d 295, 301 (Minn. App. 1993) ("In a dispute involving cost of living adjustments, the obligor has the burden of proving that a cost of living adjustment should not be made."); *see also* Minn. Stat. § 518A.75, subd. 3 (2010) (explaining that a COLA may not take effect if the obligor establishes an insufficient increase in income to facilitate the COLA). Husband's objection to disclosure of financial documents related to his income on the basis that the documents were "not reasonably calculated to lead to the discovery of admissible evidence" was not well founded. *See* Minn. R. Evid. 401 (defining "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence").

Moreover, wife was entitled to a copy of husband's most recent tax return under Minnesota statute. When a child-support order is in effect, as one is here, "a party or the public authority may require the other party to give them a copy of the party's most recent federal tax returns." Minn. Stat. § 518A.28(b) (2010). Husband argued that he did not disclose his 2009 return because he had not yet filed it. But husband also refused to provide his 2008 return, which would have been his most recent return if he had not filed his 2009 return.

Husband argues that the attorney fee award was improper because his conduct comported with the rules of civil procedure. But husband cites no authority to support his assertion that so long as conduct comports with procedural rules, it cannot unreasonably

contribute to the expense of litigation. The fact that husband did not violate a rule of civil procedure does not make the award of attorney fees improper.

Husband also argues that he was willing to "meet-and-confer" with wife's counsel, but she refused. *See* Minn. R. Civ. P. 37.01(b) (requiring an individual moving to compel discovery to swear that they have "in good faith conferred or attempted to confer" with the other party regarding the discovery request). This focus misconstrues the issue on appeal. Husband's purported willingness to "meet-and-confer" does not foreclose the conclusion that he unreasonably contributed to the expense of the proceeding and increased wife's attorney fees. In any event, the district court found that husband's assertion that he tried to "meet-and-confer" with counsel were not credible. This court defers to the district court's credibility determination. *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988).

We are mindful that "[a]n award of attorney fees rests almost entirely within the discretion of the [district] court and will not be disturbed absent a clear abuse of discretion." *Crosby v. Crosby*, 587 N.W.2d 292, 298 (Minn. App. 1998) (quotation omitted), *review denied* (Minn. Feb. 18, 1999). A lack of specific findings is not fatal to an attorney fee award where the order "reasonably implies that the district court considered the relevant factors and where the district court was familiar with the history of the case." *Geske*, 624 N.W.2d at 817 (quotation omitted) (discussing the sufficiency of findings with regard to need-based attorney fees). Although more detailed findings would have been desirable, our review of the record reveals support for the attorney fee award and indicates that the district court considered the relevant factors. *See id.* We

therefore conclude that the district court did not abuse its discretion, and we do not disturb the award. *See Crosby*, 587 N.W.2d at 298.

Affirmed.

Dated:

Judge Michelle A. Larkin