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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0249**

Marcia Lynn Graybow, petitioner,
Respondent,

vs.

Steven Harlan Graybow,
Appellant.

**Filed December 10, 2012
Affirmed in part and reversed in part
Johnson, Chief Judge**

Hennepin County District Court
File No. 27-FA-000268968

Michael L. Perlman, Katherine Ray, Perlman Law Office, Minnetonka, Minnesota (for respondent)

Jonathan J. Fogel, Fogel Law Offices, P.A., Minneapolis, Minnesota (for appellant)

Considered and decided by Johnson, Chief Judge; Bjorkman, Judge; and Crippen, Judge.*

*Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. IV, § 10.

UNPUBLISHED OPINION

JOHNSON, Chief Judge

Marcia Lynn Graybow and Steven Harlan Graybow were married in 1990 and were divorced in 2001 pursuant to a stipulated judgment and decree. In 2011, Mr. Graybow moved to modify, among other things, his spousal-maintenance obligation, and Ms. Graybow moved for a judgment on spousal-maintenance arrears and for attorney fees. The district court denied Mr. Graybow's motion with respect to his spousal-maintenance obligation and ordered him to pay spousal-maintenance arrears and attorney fees. We conclude that the district court erred only by entering judgment for Ms. Graybow on her claim for spousal-maintenance arrears. Therefore, we affirm in part and reverse in part.

FACTS

The parties' marriage was dissolved by a stipulated judgment and decree, which was entered on November 15, 2001. At the time of the dissolution, Mr. Graybow was 50 years old, was self-employed with a monthly net income of \$7,000, and had reasonable monthly expenses of \$4,000. Ms. Graybow was 47 years old and was not employed, having been the homemaker and primary caregiver for the parties' three minor children, who were ages seven, five, and three years old at the time of the dissolution. Ms. Graybow had reasonable monthly living expenses of \$7,000.

The decree provided that Mr. Graybow would pay \$1,500 per month in child support. The decree also provided that Mr. Graybow would pay spousal maintenance in amounts beginning at \$3,000 per month and increasing to \$4,500 per month. The decree

did not specify the duration of Mr. Graybow's spousal-maintenance payments. In 2003, the parties informally agreed to changes in Mr. Graybow's monthly payments so that the sum of his child-support and spousal-maintenance payments was reduced by \$800 per month.

In November 2010, Mr. Graybow moved to modify the decree with respect to his child-support and spousal-maintenance obligations, and he amended his motion in January 2011. Specifically, Mr. Graybow sought an order (1) reducing the amount of spousal maintenance to \$1,000 per month for 2011; (2) terminating his spousal-maintenance obligation after 2011; (3) reducing his child-support obligation pursuant to statutory amendments; (4) reducing his obligation to pay for Ms. Graybow's health-related expenses and certain other expenses incurred for the benefit of their children; and (5) requiring Ms. Graybow to undergo a vocational evaluation to determine her earning capacity. In February 2011, Ms. Graybow moved for a judgment of \$86,386 for unpaid spousal maintenance and for need-based attorney fees.

In April 2011, the district court denied Mr. Graybow's motion to the extent that it sought a vocational evaluation of Ms. Graybow, deferred ruling on the remaining issues, and scheduled an evidentiary hearing to focus on Mr. Graybow's financial circumstances. In August 2011, after the evidentiary hearing, the district court granted Mr. Graybow's motion to the extent that it concerned child support, other child-related expenses, and Ms. Graybow's health-related expenses. But the district court denied Mr. Graybow's motion to the extent that it concerned spousal maintenance and ordered him to continue paying spousal maintenance of \$4,500 per month. The district court also denied

Ms. Graybow's claim for \$86,386 in spousal-maintenance arrears but granted her request for need-based attorney fees in the amount of \$5,992. Both parties filed motions for amended findings. In December 2011, the district court amended its earlier order by awarding Ms. Graybow \$17,600 in spousal-maintenance arrears.

Mr. Graybow appeals.

D E C I S I O N

I. Spousal Maintenance

Mr. Graybow argues that the district court erred by denying his motion to modify spousal maintenance. He challenges the district court's findings on specific issues relating to spousal maintenance as well as the district court's ultimate decision to deny the motion.

A district court may grant an award of spousal maintenance if it finds that one of the divorcing spouses either

(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, or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home.

Minn. Stat. § 518.552, subd. 1 (2010). An award of spousal maintenance "shall be in amounts and for periods of time, either temporary or permanent, as the court deems just,

without regard to marital misconduct, and after considering all relevant factors.” Minn. Stat. § 518.552, subd. 2 (2010). The relevant factors are the financial resources of the spouse seeking maintenance to provide for his or her needs independently, the time necessary to acquire education to find appropriate employment, the age and health of the recipient spouse, the standard of living established during the marriage, the length of the marriage, the contribution and economic sacrifices of a homemaker, and the resources of the spouse from whom maintenance is sought. *Id.*; see also *Kampf v. Kampf*, 732 N.W.2d 630, 633–34 (Minn. App. 2007), *review denied* (Minn. Aug. 21, 2007). No single factor is dispositive. *Broms v. Broms*, 353 N.W.2d 135, 138 (Minn. 1984). In essence, the district court balances the recipient’s needs against the obligor’s ability to pay. *Prahl v. Prahl*, 627 N.W.2d 698, 702 (Minn. App. 2001).

A district court may modify an award of spousal maintenance based on a substantial change in circumstances if the change makes the existing award unfair and unreasonable. Minn. Stat. § 518A.39, subd. 2(a), (b) (2010). The circumstances that may warrant modification include a “substantially increased or decreased gross income of an obligor or obligee” and a “substantially increased or decreased need of an obligor or obligee.” *Id.*, subd. 2(a)(1), (2). A district court also must consider the statutory factors that are relevant to an initial award of spousal maintenance. *Id.*, subd. 2(d) (citing Minn. Stat. § 518.552, subd. 2). The party moving to modify a spousal-maintenance award bears the burden of demonstrating a substantial change in circumstances that renders the existing order unfair and unreasonable. *Hecker v. Hecker*, 568 N.W.2d 705, 709 (Minn. 1997). We apply a clearly erroneous standard of review to a district court’s findings of

fact concerning spousal maintenance, *Gessner v. Gessner*, 487 N.W.2d 921, 923 (Minn. App. 1992), and an abuse-of-discretion standard of review to a district court's decision regarding whether to modify an existing maintenance award, *Hecker*, 568 N.W.2d at 709-10.

A. Permanent Nature of Existing Award

Mr. Graybow first contends that the district court erred by ruling that his existing spousal-maintenance obligation is permanent, not temporary.

In its April 2011 order, the district court reviewed the terms of the decree and determined that it provided for permanent spousal maintenance. This determination did not resolve Mr. Graybow's motion to terminate his spousal-maintenance obligation. Rather, the effect of the district court's April 2011 interpretation of the decree was merely to impose on Mr. Graybow the burden of establishing a substantial change in circumstances that warrants a reduction or termination of spousal maintenance. *See Poehls v. Poehls*, 502 N.W.2d 217, 218 (Minn. App. 1993).

As the district court noted, the decree did not specify a duration or explicitly state whether the spousal-maintenance obligation was permanent or temporary. The district court reasoned that "if any sort of rehabilitative or otherwise temporary maintenance had been intended, language specifying an end date or triggering event could have been and should have been included."

We agree with the district court's interpretation of the decree. In the absence of a clear statement that the spousal-maintenance obligation was temporary, the document should be interpreted to mean that Mr. Graybow's obligation is permanent. *See Gales v.*

Gales, 553 N.W.2d 416, 418 (Minn. 1996) (noting that district court, “by failing to designate when payments would end, . . . in effect awarded permanent maintenance”). Thus, the district court did not err by ruling that Mr. Graybow’s existing spousal-maintenance obligation is permanent and that he bears the burden to establish the facts necessary for modification.

B. Vocational Evaluation

Mr. Graybow contends that the district court erred by denying his request for a vocational evaluation of Ms. Graybow. He contends that such an evaluation would elicit evidence relevant to his argument that Ms. Graybow is able to engage in remunerative employment that would provide her with self-support. In response, Ms. Graybow contends primarily that a determination of her potential income is not necessary to the district court’s analysis of Mr. Graybow’s motion.

The parties’ arguments on this issue focus on the issues of income and potential income, without addressing the legal basis of an order for a vocational evaluation. The law concerning income and potential income in the context of spousal maintenance is pertinent backdrop, but this court also must consider the relevant procedural requirements. The vocational evaluation that Mr. Graybow seeks is essentially a discovery device. It appears that the motion would be governed by rule 35 of the Minnesota Rules of Civil Procedure, if that rule applies, because Mr. Graybow has not cited any other provision of law permitting or requiring vocational evaluations in this circumstance. But rule 35, by its own terms, applies only if “the physical or mental condition or the blood relationship of a party . . . is in controversy.” Minn. R. Civ. P.

35.01. The only published opinion in which rule 35 authorized a vocational evaluation involved both a physical examination and a vocational evaluation of a man who was injured in an automobile accident. *See Wills v. Red Lake Mun. Liquor Store*, 350 N.W.2d 452, 453-54 (Minn. App. 1984). Accordingly, it is doubtful whether rule 35 authorizes a vocational evaluation if a person's physical or mental condition is not at issue. Furthermore, a deferential abuse-of-discretion standard of review would apply. *See Kresko v. Rulli*, 432 N.W.2d 764, 770 (Minn. App. 1988), *review denied* (Minn. Jan. 31, 1989).

Assuming that rule 35 or some other provision of law may authorize a vocational evaluation in these circumstances, Mr. Graybow's argument would encounter other problems. He contends that a vocational evaluation of Ms. Graybow is necessary because the district court could and should use the results of the evaluation to impute income to Ms. Graybow pursuant to section 518A.32, subdivisions 1 and 2(1) (2010), and section 518A.34(b)(1) (2010) of the Minnesota Statutes. Mr. Graybow's contention is flawed because the statutes he cites are concerned with the calculation of child support, not spousal maintenance. Both sections are contained in chapter 518A and address child support, not spousal maintenance. One of the statutes he cites specifically states, "This section applies to child support orders" Minn. Stat. § 518A.32, subd. 1. The other statute states that it may be applied "[t]o determine the obligor's basic support obligation." Minn. Stat. § 518A.34(b)(1). Mr. Graybow contends that there is a rebuttable presumption "that a parent can be gainfully employed on a full-time basis," but this presumption also is concerned with child support, not spousal maintenance. *See*

Minn. Stat. § 518A.32, subd. 1. There is no such statutory presumption for the issue of spousal maintenance.

Thus, the district court did not err by denying Mr. Graybow's request for a vocational evaluation of Ms. Graybow.

C. Mr. Graybow's Expenses

Mr. Graybow contends that the district court erred by finding that his reasonable monthly living expenses are only \$7,000, rather than \$17,000, as he had argued. He asserts that he "clearly itemized each and every line-item on his budget and provided proof of said expenses."

The district court did not reject Mr. Graybow's argument because his expenses were unsubstantiated. Rather, the district court found that a monthly budget of \$17,000 was "unreasonably high" and that his living expenses were reduced by his use of a business expense account. The district court noted that Mr. Graybow's duty to support Ms. Graybow continues even though he has remarried and is supporting his current wife and her children. *See Halvorson v. Halvorson*, 402 N.W.2d 168, 172 (Minn. App. 1987) (stating that obligor's "remarriage is an insufficient change of circumstance to support a termination of maintenance"). The district court also noted that Mr. Graybow's monthly expenses at the time of the dissolution in 2001 were only \$4,000, exclusive of debt service. Thus, the district court's finding that Mr. Graybow's reasonable monthly expenses are \$7,000 is supported by the record and not clearly erroneous. *See Gessner*, 487 N.W.2d at 923.

D. Summary

Mr. Graybow contends that the district court erred by denying his motion to modify, thereby establishing Ms. Graybow's right to permanent maintenance of \$4,500 per month.

As stated above, a district court may modify an award of spousal maintenance based on a substantial change in circumstances if the change makes the existing award unfair and unreasonable. Minn. Stat. § 518A.39, subd. 2(a), (b). Because Mr. Graybow was the moving party, he had the burden of proving a substantial change in circumstances that renders the existing order unfair and unreasonable. *Hecker*, 568 N.W.2d at 709. The district court concluded that Mr. Graybow had not satisfied his burden of proving a substantial change in circumstances that makes the existing award unfair and unreasonable. The district court noted that Mr. Graybow's income has increased, not decreased, in the decade since the dissolution. Ms. Graybow's earned income also has not changed since the dissolution because she has remained unemployed. Also, Ms. Graybow's claimed monthly expenses were not challenged. Accordingly, the district court did not clearly err by finding that Mr. Graybow failed to prove a substantial change in circumstances, such as a "substantially increased or decreased gross income of an obligor or obligee" or a "substantially increased or decreased need of an obligor or obligee." Minn. Stat. § 518A.39, subd. 2(a)(1), (2). In addition, the relevant statute provides, "Where there is some uncertainty as to the necessity of a permanent award, the court shall order a permanent award leaving its order open for later modification." Minn. Stat. § 518.552, subd. 3.

In sum, the district court did not abuse its discretion by denying Mr. Graybow's motion to modify the existing award of spousal maintenance.

II. Arrears

Mr. Graybow next argues that the district court erred by entering judgment in the amount of \$17,600 on Ms. Graybow's claim for spousal-maintenance arrears.

The district court initially denied Ms. Graybow's claim for arrears. The district court later changed its decision after Ms. Graybow moved for amended findings. In its amended order, the district court relied on exhibits that had not previously been introduced into evidence. Mr. Graybow contends that the district court erred by relying on evidence that was submitted to the district court for the first time with Ms. Graybow's motion for amended findings.

“When considering a motion for amended findings, a district court ‘must apply the evidence as submitted during the trial of the case’ and ‘may neither go outside the record, nor consider new evidence.’” *Zander v. Zander*, 720 N.W.2d 360, 364 (Minn. App. 2006) (quoting *Rathbun v. W.T. Grant Co.*, 300 Minn. 223, 238, 219 N.W.2d 641, 651 (1974)), *review denied* (Minn. Nov. 14, 2006). It is undisputed that the district court did not adhere to this rule when awarding Ms. Graybow relief on her claim for spousal-maintenance arrears. In her brief, Ms. Graybow concedes that she offered exhibits with her motion for amended findings that had not previously been introduced. The district court erred by relying on that evidence when it ruled in favor of Ms. Graybow on her claim for spousal-maintenance arrears. Accordingly, we reverse this part of the district court judgment.

III. Attorney Fees

Mr. Graybow last argues that the district court erred by granting Ms. Graybow's motion for need-based attorney fees. Specifically, Mr. Graybow argues that the district court erred by failing to make a finding that he has the ability to pay Ms. Graybow's attorney fees.

A district court "shall" award need-based attorney fees if it finds that the fees are necessary for a good-faith assertion of the recipient's rights and will not contribute unnecessarily to the length or expense of the proceeding, that the payor has the ability to pay the fees, and that the recipient cannot pay the fees. Minn. Stat. § 518.14, subd. 1 (2010). We apply an abuse-of-discretion standard of review to a district court's ruling on a request for need-based attorney fees. *Lee v. Lee*, 775 N.W.2d 631, 643 (Minn. 2009).

The district court awarded Ms. Graybow \$5,992 in need-based attorney fees after finding that she did not have the resources to defend against Mr. Graybow's motion to modify or to assert her own motion to recover spousal-maintenance arrears. Mr. Graybow correctly states that the district court did not make an express finding concerning his ability to pay. But the absence of such a finding does not necessarily require reversal:

a lack of specific findings on the statutory factors for a need-based fee award under Minn. Stat. § 518.14, subd. 1, is not fatal to an award where review of 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" and "had access to the parties' financial records."

Geske v. Marcolina, 624 N.W.2d 813, 817 (Minn. App. 2001) (quoting *Gully v. Gully*, 599 N.W.2d 814, 825-26 (Minn. 1999)).

In this case, the district court was familiar with Mr. Graybow's financial status because the district court had conducted an evidentiary hearing that was focused on that issue and had made findings of fact concerning his income and expenses. The district court's orders reasonably imply that the district court considered the relevant factors and found that Mr. Graybow had the ability to pay Ms. Graybow's attorney fees. Thus, we conclude that the district court did not abuse its discretion by granting Ms. Graybow's motion for need-based attorney fees.

Affirmed in part and reversed in part.