STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1009

In re the Marriage of:
Lori Elaine Coleal, petitioner,
Respondent,

vs.

David Michael Coleal,
Appellant.

Filed March 25, 2013
Affirmed
Huspeni, Judge[*]

St. Louis County District Court
File No. 69DU-FA-08-210

Larry M. Nord, Orman Nord & Hurd, Duluth, Minnesota (for respondent)

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

Considered and decided by Halbrooks, Presiding Judge; Larkin, Judge; and Huspeni, Judge.

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

HUSPENI, Judge

Appellant David Coleal argues that the district court abused its discretion in awarding permanent spousal maintenance to respondent Lori Coleal, that the provision in

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

the dissolution judgment stating that the maintenance award is subject to "review" does not address the standard for that review, and that the attorney-fee award to respondent is defective because it does not identify the portions of the award that are need-based and conduct-based and because the record supports neither type of fee award. We affirm.

FACTS

The parties married in 1992, had three children, and, in January 2008, started to discuss the dissolution of their marriage, purportedly reaching a partial agreement that reserved certain issues. By order filed September 12, 2008, the district court directed enforcement of the parties' disputed settlement agreement, and, on October 10, 2008, the district court entered a partial judgment dissolving the marriage. Respondent appealed the order and partial judgment; this court dismissed that appeal as premature. *Coleal v. Coleal* (*Coleal I*), No. A08-1871 (Minn. App. Mar. 24, 2009) (order dismissing appeal).

After a trial the district court entered a January 2010 supplemental judgment that, among other things, altered certain terms of the stipulated October 2008 partial judgment because, while respondent believed that she would receive $600,000 to $800,000 in stock options, the options had become worthless as of April 29, 2008. *Coleal v. Coleal* (*Coleal II*), No. A10-1365, 2011 WL 2175812, at 1, *3 (Minn. App. June 6, 2011). The district court ruled that certain "performance shares" that appellant subsequently acquired "took the place" of the stock options, and divided those "performance shares" as marital property. Appellant then moved to amend the supplemental judgment, arguing that the district court lacked authority to address questions not previously reserved; the district court agreed, reinstating much of the October 2008 judgment. *See id.* at *2-*3.

After entry of a final amended supplemental judgment, appeal was taken by appellant, and respondent filed a notice of review. This court, by opinion filed June 6, 2011, noted that the October 2008 stipulated partial judgment was based on incomplete information, and that the district court, when entering the final judgment, had erroneously considered itself bound by the prior partial October 2008 judgment. *Id.* at *3-5.

Coleal II stated that

> [o]n discovering that the information omitted from the original negotiations affected more than the reserved terms of the stipulation, the district court should have afforded the parties an opportunity to litigate all of the affected terms, which, in this case, appear to be all terms of the property division and possibly the maintenance agreement.

Id. at *5.

Coleal II then reversed and remanded to enable the district court to, among other things, "determine which terms of the October 2008 judgment need to be litigated to obtain the fair division of assets required by Minn. Stat. § 518.58 (2010), and to allow both parties to maintain the standard of living enjoyed during the marriage as contemplated by the dissolution statutes." *Id.* at *5.

After a hearing on remand, the district court entered a judgment, and both parties moved to amend. After a hearing on those motions, the district court granted them in part and denied them in part, and entered an amended judgment on April 12, 2012. That judgment granted the parties joint legal custody of the children with sole physical custody to respondent. It also awarded respondent child support of $1,893 per month, permanent

maintenance of $10,000 per month, and $50,000 in attorney fees. Appellant challenges the awards of maintenance and attorney fees.

D E C I S I O N

I.

The dissolution judgment permits either party to move to modify maintenance "pursuant to M.S.A. 518.552, Subdivision 3," and also provides that either party may seek "review" of the maintenance award after June 15, 2015─the date respondent is expected to finish a program for her education.

When addressing awards of spousal maintenance, a district court considers the factors listed in Minn. Stat. § 518.552, subds. 1-3 (2012). Decisions regarding the amount and duration of maintenance are discretionary with that court. *Erlandson v. Erlandson*, 318 N.W.2d 36, 38 (Minn. 1982). A district court abuses its discretion by resolving a maintenance issue in a manner that is "against logic and the facts on the record." *Rutten v. Rutten*, 347 N.W.2d 47, 50 (Minn. 1984). On appeal, appellate courts

> apply a clearly erroneous standard of review to a district court's findings of fact concerning spousal maintenance. We apply an abuse-of-discretion standard of review to a district court's determination of the proper amount and duration of an award of spousal maintenance. And we apply a *de novo* standard of review to questions of law related to spousal maintenance.

Maiers v. Maiers, 775 N.W.2d 666, 668 (Minn. App. 2009) (citations omitted). When reviewing findings of fact, appellate courts view the record "in the light most favorable" to the findings. *Vangsness v. Vangsness*, 607 N.W.2d 468, 474 (Minn. App. 2000).

A. Ability to seek modification

This court has stated that a recipient of permanent maintenance "did not incur an obligation to increase her earning power through occupational retraining." *Sand v. Sand*, 379 N.W.2d 119, 124 (Minn. App. 1985), *review denied* (Minn. Jan. 31, 1986). Citing this aspect of *Sand*, appellant asserts that setting respondent's permanent maintenance award in an amount including the cost of her educational program is an abuse of the discretion because the permanent nature of the award means that respondent is under no obligation to rehabilitate. Appellant urges that if respondent does not rehabilitate, her circumstances will not change (she was unable to support herself when maintenance was awarded and if she does not rehabilitate she will still be unable to do so when she ceases pursuing her education) and hence that appellant will be unable to show the substantially changed circumstances required to modify maintenance under Minn. Stat. § 518A.39 (2012).

We need not address whether appellant's argument regarding the nature of permanent maintenance would be persuasive in a case involving a dissolution judgment that includes only standard provisions regarding permanent maintenance. Appellant's argument lacks merit under the circumstances present here. This district court found that "[t]here is uncertainty and, therefore, an award of permanent maintenance, subject to later modification, is justified. It is reasonable to review this issue after June 15, 2015, a date after [respondent's] projected graduation from her current educational program." The court went on to conclude that "[t]he issue of maintenance is subject to a motion for modification which may be made by either party pursuant to M.S.A. 518.552,

Subdivision 3." Thus, in addition to referring to the typically permitted "modification" of maintenance, this judgment also allows either party to seek "[a] review" of maintenance after June 15, 2015.

Appellant argues that the judgment's failure to identify the standard to be used for the "review" shows that the district court abused its discretion by including the "review" provision in the judgment. Appellant also asserts that "[a] de novo review is the only review that would be logical in th[is] case." Importantly, respondent agrees that a de novo standard should be applied at any "review." This court agrees also. Therefore, we direct the district court to assure that any future requested review of maintenance will address that question de novo.[1] Review shall proceed by applying section 518.552, without any reference to the requirements of section 518A.39.

B. Permanent maintenance

While couched in language somewhat different from that raised regarding the issue of modification, appellant makes an essentially similar argument in claiming that the district court abused its discretion in awarding permanent maintenance. To the extent that appellant's argument is based on his fear that an award of permanent maintenance

[1] Appellant's reply brief asserts that the judgment "makes the review of spousal maintenance subject to the modification standard under Minn. Stat. § 518A.39, subd. 2." Because appellant makes this argument for the first time in his reply brief, the argument is not properly before this court. *See McIntire v. State*, 458 N.W.2d 714, 717 n.2 (Minn. App. 1990) (stating that issues not raised or argued in an appellant's principal brief cannot be revived in a reply brief), *review denied* (Minn. Sept. 28, 1990); *cited in Szarzynski v. Szarzynski*, 732 N.W.2d 285, 291 n.3 (Minn. App. 2007). Even if we were to address the merits of this reply-brief argument, we would conclude that appellant's argument has been resolved by our direction that, in any future review of spousal maintenance, no reference to section 518A.39 will be made and that a de novo standard of review under section 518.552 will be conducted.

limits his ability to obtain a modification because respondent's failure to rehabilitate will preclude him from satisfying the standard for modifying maintenance recited in Minn. Stat. § 518A.39, that argument is addressed above.

Further, we reject appellant's argument that, under *Gales v. Gales*, 553 N.W.2d 416, 421 (Minn. 1996), permanent maintenance requires "an exceptional case" and that this case is not "exceptional." The supreme court, in *Dobrin v. Dobrin*, 569 N.W.2d 199, 201 (Minn. 1997), rejected the idea that *Gales* re-established the pre-1985 "exceptional-case" standard for awarding permanent maintenance. *See Chamberlain v. Chamberlain*, 615 N.W.2d 405, 411 (Minn. App. 2000) (stating "while *Dobrin* dispels any suggestion that *Gales* resurrected *McClelland* [*v. McClelland*, 359 N.W.2d 7, 10 (Minn. 1984)]'s 'exceptional-case' standard for awarding permanent maintenance, *Dobrin* also makes clear that permanent maintenance awards are considered in light of the factors set forth in Minn. Stat. § 518.552 subd. 2"), *review denied* (Minn. Oct. 25, 2000).[2]

In *Dobrin* the supreme court reversed an award of permanent maintenance. 569 N.W.2d at 203. This case is not similar to *Dobrin*, however. Unlike this marriage, the Dobrin marriage was one of only two-and-one-half years duration[3], and the supreme court noted that any "uncertainty" about that maintenance recipient's employment prospects "was created only by her minimal affirmative efforts at obtaining reemployment as exhibited by this record." 569 N.W.2d at 200, 203. Further, the *Dobrin*

[2] We are also not persuaded by appellant's assertion that this 16-year marriage is not a long term marriage. *See Gales*, 553 N.W.2d at 421 (refusing to "quibble with" a finding that an 11-year marriage was "long-term").

[3] The parties in *Dobrin* had a 20-year relationship, but the supreme court focused on the length of the marriage. *See* 569 N.W.2d at 200.

dissolution judgment lacked a provision allowing a de novo review of the maintenance obligation, and *Dobrin* arose in what the supreme court stated "might best be characterized as a unique factual and procedural context." *Id.* Therefore, we are not convinced by appellant's argument that *Dobrin* requires reversal of the permanent maintenance awarded here.

Other cases appellant cites contain no finding of uncertainty that the maintenance recipient would become self-supporting. *See Maiers*, 775 N.W.2d at 668-70 (noting that district court's finding that the maintenance recipient would become self-supporting "'at some point'"); *Aaker v. Aaker*, 447 N.W.2d 607, 611 (Minn. App. 1989) (addressing the time it was expected to take the maintenance recipient to complete reeducation and her expected income, without finding any uncertainty about her ability to become self-supporting), *review denied* (Minn. Jan. 12, 1990); *Hall v. Hall*, 417 N.W.2d 300, 303 (Minn. App. 1988) (noting that "[t]here was no evidence that [the maintenance recipient] is unlikely to become self-sufficient"). Here, the district court recognized that respondent may be able to finish her education and work full-time but also recognized that respondent's *ability* to finish her education and her *ability* to work full time do not ensure that, upon finishing her education, respondent will *actually* be able to become employed and self-supporting. This concern is similar to one articulated by the supreme court in *Nardini* where it directed an award of permanent maintenance: "Being capable of employment and being appropriately employed are not synonymous. . . ." *Nardini v. Nardini*, 414 N.W.2d 184, 187 (Minn. 1987).

Appellant asserts that the uncertainty about respondent's ability to become self-supporting after finishing her educational program is insufficient to allow an award of permanent maintenance, and urges that "[s]uch a theory could be used in every maintenance case and effectively eliminate temporary maintenance [because t]here is never certainty that a party will rehabilitate or that there will be jobs available." Appellant's argument is not persuasive, however, in view of the statutory language that directs "[w]here there is *some* uncertainty as to the necessity of a permanent [maintenance] award, the court *shall* order a permanent award leaving its order open for later modification." Minn. Stat. § 518.552, subd. 3 (emphasis added); *see* Minn. Stat. § 645.44, subd. 16 (2012) (stating "'[s]hall' is mandatory"). The statutory language that directs an award of permanent maintenance upon a determination of uncertainty also provides for "leaving [an] order open for later modification." Minn. Stat. § 518.552, subd. 3. And the supreme court, in a case where the district court found uncertainly about the need for permanent maintenance, has stated:

> The statute requires that uncertainty to be met by an award of permanent maintenance with the order left open for later modification. That the trial court retains jurisdiction over a temporary award does not make temporary maintenance an acceptable alternative when it is uncertain that the spouse seeking maintenance can ever become self-supporting.

Nardini, 414 N.W.2d at 198 (citation omitted).

Appellant's argument ignores the fact that, in the present case, maintenance can be reviewed de novo in the future. That de novo review may address both the amount of maintenance and its duration. Also, the record here supports a determination that

respondent will not be able to support herself *before* completing her educational program.[4]

II.

In dissolution proceedings, a court has authority to award attorney fees based on need. Minn. Stat. § 518.14, subd. 1 (2012). It also has authority to award fees based on conduct. *Id.* The judgment requires appellant to pay $50,000.00 of respondent's attorney fees, which total over $90,000. The findings of fact show that the fee award was based on both respondent's need and appellant's conduct.

Appellant objects to the award of attorney fees and asserts that because the judgment does not identify how much of the fee award is need-based and how much is conduct-based, meaningful review of the award cannot occur. *See Geske v. Marcolina*, 624 N.W.2d 813, 816 (Minn. App. 2001) (stating that because "[t]he standards for making need-based and conduct-based fee awards are different[,] . . . fee awards . . . must indicate to what extent the award was based on need or conduct or both").

We note initially that there may be some validity to appellant's challenges to the conduct-based portion of the fee award. Respondent, not appellant, filed the first appeal, and respondent filed a notice of review in the second appeal which remanded the case. The record thoroughly supports, however, the findings that appellant failed to produce

[4] Appellant's current challenge to the finding that it is uncertain whether respondent will be able to become self-supporting after completing her educational program arguably is premature. *See generally Driscoll v. Driscoll*, 414 N.W.2d 441, 446-47 (Minn. App. 1987) (ruling that if a district court awards temporary maintenance and reserves whether to award additional maintenance until the end of rehabilitative maintenance, it is premature to challenge that reservation on appeal from the dissolution judgment); cited in *Reinke v. Reinke*, 464 N.W.2d 513, 515 (Minn. App. 1990).

relevant discovery in a timely manner. *See Stageberg v. Stageberg*, 695 N.W.2d 609, 617 (Minn. App. 2005) (noting the "fiduciary obligation to present full and complete information to the dissolution court" imposed on parties to dissolution proceedings), *review denied* (Minn. Jul. 19, 2005); *Doering v. Doering*, 629 N.W.2d 124, 129-30 (Minn. App. 2001) (discussing the affirmative duty of parties to dissolution proceedings to disclose information), *review denied* (Minn. Sept. 11, 2001).

While appellant's argument that respondent's conduct contributed to the expense and delay of the dissolution proceedings may have some merit, our review of the record convinces us that the entire fee award can be affirmed as a need-based award.

In a dissolution proceeding, a court "shall" award need-based attorney fees if the district court finds that the fees are "necessary" for a "good faith assertion of the party's rights[,]" the award "will not contribute unnecessarily to the length and expense of the proceeding[,]" the payor "has the means to pay [the award,]" and the recipient does not. Minn. Stat. § 518.14, subd. 1. The parties agree that a district court's award of need-based attorney fees will not be altered on appeal unless the district court abused its discretion in making the award. *See, e.g.*, *Gully v. Gully*, 599 N.W.2d 814, 825 (Minn. 1999).

A. Respondent's need for fees

The district court found:

> Without including possible taxes on the spousal maintenance, the monthly budget for [respondent] and the children is approximately $12,789 per month. The current budget does not include any money for vacations, personal recreation, eating out, or similar items enjoyed by the parties when they

> resided together in Duluth. [Respondent] spends a significant amount of money per month on horses. She began a horse breeding business that allows her to "write off" losses. The cost of the horse business is included in the budget. A reasonable monthly budget for [respondent] is $12,789.00.

This court may properly infer that reasonable monthly expenses for respondent and the children are $12,789.[5] Monthly expenses of $12,789 exceed the sum of the monthly maintenance and child support awards to respondent. Respondent has, thus, shown a need for the fees awarded to her.

Appellant asserts, however, that respondent does not need the fees because, since 2009,

> [respondent] has received in excess of $700,000 in cash from [appellant] . . . and over $200,000 in retirement accounts. In total [respondent] has received almost $1 million over a four year period. Certainly [respondent] could have paid her attorney with the $700,000 in cash she received.

To the extent that appellant is claiming that he paid respondent sufficient maintenance and support to allow her to pay her attorney fees out of those amounts, the district court rejected that claim. This rejection is consistent with respondent's pre-tax monthly deficit. Further, the district court observed that respondent has already invaded her property award to pay her attorney fees. Nor should respondent be required to liquidate her retirement funds to pay attorney fees. The availability of these funds might very well reduce respondent's need for spousal maintenance during her retirement years.

[5] It is also possible to read this finding to suggest that a $12,789 monthly budget for respondent and the children understates both their actual expenses (because $12,789 omits taxes on respondent's maintenance award) and the marital standard of living (because $12,789 also omits several expenses typically incurred during the marriage).

B. Appellant's ability to pay and length/expense of proceeding

The district court found appellant's monthly gross income and his reasonable monthly expenses to be $32,500 and $8,579, respectively. After paying his monthly expenses and his spousal-maintenance and child-support obligations, appellant has a monthly surplus[6] that indicates appellant has the ability to pay the fees. And appellant does not assert, nor does this record show, that the fees awarded to respondent unreasonably extended the length or expense of the proceeding. Thus, the statutory requirements for a need-based fee award are satisfied, and we need not address the appropriateness of the award of conduct-based fees.

A final note: We recognize that an argument could be made for the appropriateness of yet another remand to direct the district court to clearly allocate the award of attorney fees between need and conduct. We are convinced, however, that such a remand would almost certainly result in the district court's insertion of relevant findings that reached the same result as already reflected in this record. We decline to inflict upon the parties the additional emotional and financial toll that a solely perfunctory remand would impose. *See Grein v. Grein*, 364 N.W.2d 383, 387 (Minn. 1985) (declining to remand and affirming the district court in a child-custody case when "from reading the files, the record, and the court's findings, on remand the [district] court would undoubtedly make findings that comport with the statutory language" and reach the same result); *Tarlan v. Sorensen*, 702 N.W.2d 915, 920 n.1 (Minn. App. 2005) (citing *Grein*,

[6] This surplus is $12,028 ($32,500 gross monthly income, minus $8,579 monthly expenses, minus $10,000 monthly maintenance, minus $1,893 (appellant's portion of child support)).

364 N.W.2d at 387). While there may, indeed, be future proceedings in this case regarding a de novo review of spousal maintenance, we believe the best interests of the parties and the minor children will be served by bringing to a final conclusion the issue of attorney fees awarded by the district court in its April 12, 2012 judgment.

Affirmed.