STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0611

In re the Marriage of:
Michon A. Ross, petitioner,
Respondent,

vs.

Kevin G. Ross,
Appellant.

Filed June 16, 2014
Affirmed
Meyer, Judge[*]

Hennepin County District Court
File No. 27-FA-08-4592

Donna M. Gray, Minneapolis, Minnesota; and

Thomas A. Gilligan, Jr., Murnane Brandt, P.A., St. Paul, Minnesota (for respondent)

Kevin G. Ross, Minnetonka, Minnesota (attorney pro se for appellant)

Considered and decided by Meyer, Presiding Judge; Martin and Kraker, Judges.[**]

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[*] Retired justice of the Minnesota Supreme Court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10, and Minn. Stat. § 2.724, subd. 3 (2012).

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

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

MEYER, Judge

Appellant Kevin G. Ross claims that the district court misapplied the law and abused its discretion by awarding respondent Michon A. Ross permanent spousal maintenance of $2,500 per month. Because the district court properly applied the law and did not abuse its discretion in awarding permanent spousal maintenance, we affirm.

FACTS

The parties were married on October 26, 1985, and divorced 24 years later. During the marriage, appellant pursued a career in law. Respondent was a full-time homemaker throughout the marriage, at times homeschooling the parties' five children and providing daycare for others.

Appellant was a police officer in Iowa when the parties first married in 1985. While respondent cared for the parties' then four minor children, appellant obtained his undergraduate degree in 1991 and then attended and graduated from law school. As appellant advanced in his legal career, moving from a federal law clerk, to a partner at a Minneapolis law firm, and then to a Judge at the Minnesota Court of Appeals, respondent continued as a homemaker, caring for their five minor children and the family home.

The parties' marriage was dissolved through a stipulated Judgment and Decree ("J&D") filed September 16, 2009, under which the parties were awarded joint legal and physical custody of their one remaining minor child, with equivalent parenting time.

At the time of the J&D, respondent was unemployed. She underwent a vocational evaluation by Dr. Phil Haber who recommended that respondent complete a vocational

college program and then secure full-time employment as a Health Unit Coordinator. At the time, appellant was a Judge on the Minnesota Court of Appeals, with an annual income of $137,551.96. Respondent claimed monthly living expenses of $5,674 and appellant claimed monthly living expenses of $4,609. Both parties disputed the other party's budget, but agreed that appellant would pay to respondent the sum of $4,500 per month for spousal maintenance until May 31, 2012, or June 1, 2012, at which time the amount and duration of any future spousal maintenance would be set for de novo review.[1]

On April 17, 2012, respondent moved for permanent spousal maintenance in the monthly amount of $4,500. Her motion was supported by an affidavit and exhibits in which she claimed that she had $5,580.28 in reasonable monthly expenses and that the stipulated prior amount was insufficient to meet her needs—she was draining the retirement accounts awarded to her in the J&D to meet her monthly expenses. Appellant opposed the motion and filed his own affidavits with attached exhibits.

At the hearing on her motion, respondent reported that she had recently obtained a job as a Health Unit Coordinator, earning approximately $2,666 per month based on a 40-hour work week. Respondent reduced her requested monthly spousal maintenance to $2,500, claiming that she needed that amount to live at or near the marital standard of living. The district court heard argument and testimony from both parties.

[1] At the time of the J&D, the parties had a marital homestead which was listed for sale for $446,200, three cars, and a sailboat. The parties did not have any debts other than storage costs for their sailboat and a $202,283 mortgage on the homestead. Pursuant to their agreement, respondent was awarded, among other things, (1) $13,000 from the sale of the parties' marital homestead, plus half its net proceeds, and (2) half the balance of the retirement accounts in appellant's name

On July 12, 2012, the district court ordered appellant to pay $2,500 permanent monthly spousal maintenance to respondent. The district court concluded that appellant must pay $2,500 permanent spousal maintenance based on: (1) the parties' lengthy marriage in which each party aided in the acquisition, preservation, and appreciation of the marital property by performing their respective roles; (2) appellant's substantially greater income and ability to pay; (3) appellant's greater earning potential; and (4) respondent's demonstrated need based on her limited earning potential and her inability to achieve the marital standard of living on her own. The district court also ordered appellant to pay guideline child support of $349 per month. Even with the spousal maintenance award and guideline child support, the district court found that respondent would have a monthly deficit after paying her reasonable monthly living expenses.

Appellant moved the district court to amend its spousal maintenance order. Although the district court amended two of its prior findings, appellant's motion was otherwise denied in its entirety. This appeal follows.

D E C I S I O N

I.

The first issue is whether the district court erred by utilizing a marital standard of living established during the marriage to determine spousal need.

Appellant contends that the district court erred as a matter of law when it utilized a marital standard of living during the marriage, not at its dissolution, to gauge respondent's need for spousal maintenance.

"[The appellate courts] review[] questions of law related to spousal maintenance de novo." *Melius v. Melius*, 765 N.W.2d 411, 414 (Minn. App. 2009).

A court may grant maintenance if one spouse 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 . . . .

Minn. Stat. § 518.552, subd. 1 (2012) (emphasis added).

The amount of maintenance shall be in the amount the court deems just, after considering all relevant factors including: "*the standard of living established during the marriage*." *Id.*, subd. 2 (emphasis added).

The district court determined that respondent needed, and appellant had the ability to pay, permanent maintenance in the amount of $2,500 per month. The court did not limit its inquiry to the family's circumstances at the time of dissolution. Rather, the court based its inquiry on appellant's work history and income throughout the marriage, the $446,200 listing price of the marital home, their vehicles, and lack of marital debt.

Appellant has proffered no reported or unreported case law holding that a district court erred as a matter of law by determining the marital standard of living based on circumstances preceding the parties' dissolution.[2] Nor can this court unearth any such

[2] Instead, appellant merely advances clear dicta from the Minnesota Court of Appeals and Minnesota Supreme Court. *See Lee v. Lee*, 775 N.W.2d 631, 642 (Minn. 2009); *Katter v.*

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case law. Instead, the district court was bound to consider the "standard of living established during the marriage" in determining: (1) whether the respondent was entitled to spousal maintenance; and (2) the amount and duration of the award. *See* Minn. Stat. § 518.552, subds. 1, 2. If the Legislature had intended to gauge the marital standard of living solely based on the circumstances existing at the time of dissolution, it would have used language to that effect. In effect, appellant invites us to amend the spousal maintenance statute, which is beyond our powers. *State v. West*, 285 Minn. 188, 197, 173 N.W.2d 468, 474 (1969) ("It is not for the courts to make, amend, or change the statutory law, but only to apply it.").

Appellant's claim, moreover, defies equity and common sense. Financial difficulties are a common contributing factor to divorce. Under appellant's view of the law, no matter what affluent lifestyle the parties enjoyed during the rest of the marriage, how long it lasted, or whether one spouse was a homemaker while the other advanced his or her career, if the parties were destitute at the time of divorce, a spouse could never obtain a future spousal maintenance award. In effect, the financial circumstances of the parties at the time of divorce would serve as a de facto *Karon* waiver, permanently limiting or outright divesting a court of jurisdiction to award spousal maintenance in myriad inequitable instances.

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Katter, 457 N.W.2d 750, 754 (Minn. App. 1990). Neither decision held that a court erred as a matter of law by gauging need based on the standard of living during the marriage, as opposed to the date of dissolution.

In short, the district court did not err as a matter of law when it utilized a marital standard of living based on circumstances preceding the parties' dissolution.

II.

We now turn to the question of whether the district court's finding that respondent needs spousal maintenance is supported by the record.

Appellant claims that regardless of how one measures the marital standard of living, the district court abused its discretion because the record does not support the finding that respondent needs spousal maintenance. His claim takes many shapes: (1) the respondent failed to adduce evidence establishing her need;[3] (2) the district court failed to adopt appellant's purportedly undisputed evidence establishing the marital standard of living; (3) the finding relative to the parties' marital standard of living was not reasonably supported by the evidence; and (4) the respondent's budget is fraudulent and exaggerated, which the district court simply "rubber stamped." Although appellant delineates these as four separate errors, they are really distilled to the following: there was insufficient evidence to support the district's court's findings on: (a) the parties' standard of living during the marriage; and/or (b) the respondent's present monthly living expenses.

[3] Appellant actually claims that the district court "erred as a matter of law" by failing to deny respondent's motion for lack of evidentiary support. In reality, it is an abuse of discretion claim. *Lee*, 775 N.W.2d at 637 ("The district court's award of maintenance . . . will only be reversed on appeal if the court abused its discretion.").

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. *Id.* "Findings 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").

Spousal maintenance is the "award . . . of payments from the future income or earnings of one spouse for the support and maintenance of the other." Minn. Stat. § 518.003, subd. 3a. (2012). A spouse qualifies for spousal maintenance if (s)he 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
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> (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.

If the spouse qualifies for spousal maintenance, its amount and duration shall be what the court deems just, after considering all relevant factors, including:

> (a) the financial resources of the party seeking maintenance, including marital property apportioned to the party, and the party's ability to meet needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party as custodian;

> (b) the time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment, and the probability, given the party's age and skills, of completing education or training and becoming fully or partially self-supporting;
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> (c) the standard of living established during the marriage;
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> (d) the duration of the marriage and, in the case of a homemaker, the length of absence from employment and the extent to which any education, skills, or experience have become outmoded and earning capacity has become permanently diminished;
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> (e) the loss of earnings, seniority, retirement benefits, and other employment opportunities forgone by the spouse seeking spousal maintenance;
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> (f) the age, and the physical and emotional condition of the spouse seeking maintenance;
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> (g) the ability of the spouse from whom maintenance is sought to meet needs while meeting those of the spouse seeking maintenance; and
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> (h) the contribution of each party in the acquisition, preservation, depreciation, or appreciation in the amount or value of the marital property, as well as the contribution of a spouse as a homemaker or in furtherance of the other party's employment or business.

Id., subd. 2.

The spousal maintenance factors shall not be construed to favor a temporary award over a permanent one. *Id.*, subd. 3. Rather, if there is any uncertainty as to the necessity of a permanent award, the district court must award permanent maintenance and allow the parties to modify it in the future. *Id.*

The party seeking maintenance has the burden to establish his or her need for it. *McConnell v. McConnell*, 710 N.W.2d 583, 586 (Minn. App. 2006). A maintenance award's purpose is to provide recipient and obligor with a standard of living—as is

equitable under the circumstances—approximating that which they enjoyed during the marriage. *Melius*, 765 N.W.2d at 416.

Appellant claims that nothing in the record supports the finding that respondent needs spousal maintenance and the district court simply adopted her fraudulent and exaggerated budget. Appellant does not contest the district court's findings on respondent's present income, his present income, his present reasonable monthly living expenses, or his ability to pay spousal maintenance. Since the respondent's net monthly income of $2,322 is uncontested—and is consistent with that which was anticipated in the J&D—appellant's real issue is the finding that respondent has reasonable monthly living expenses, considering the standard of living established during the marriage, of $4,675.

The district court made findings as follows. Respondent completed her education and found employment as contemplated by the parties at the time of the J&D. Respondent's reasonable monthly expenses amounted to $4,675 and her net monthly income was only $2,322. The court found that respondent was in need of spousal maintenance because her financial resources were inadequate to meet her needs and that she would never be fully self-supporting given her lengthy absence from the workforce, her age, and current employment.[4]

[4] The court also found that the parties enjoyed "an upper middle class lifestyle" based upon appellant's work history and income, the listing price of the homestead (a six-bedroom, four-bathroom, 3400 square foot home), the parties' vehicles, and the parties' lack of debt. Appellant argues that the evidence does not support a finding of an upper middle class lifestyle and, in fact, the parties lived a modest life style. We discourage the district court from classifying lifestyles as "upper middle class" or "middle class" as those terms are broad and subject to conflicting interpretations. The relevant inquiry is

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The district court further found that even with the assets awarded to her in the J&D and her present income, respondent "will never be able to achieve even a middle-class lifestyle based on her income alone." Accordingly, the district court found that respondent was entitled to spousal maintenance.

The district court then analyzed the spousal maintenance factors, set forth in Minn. Stat. § 518.552, subd. 2, to determine the amount of spousal maintenance. It first found that at the time of the J&D, the parties did not have significant non-retirement assets. Further, respondent needed "spousal maintenance to even come close to the parties' marital standard of living." Importantly, the district court did not merely adopt respondent's claimed monthly livings expenses. Instead, it made rather detailed findings about what expenses were excessive, and found that respondent had $4,675 reasonable monthly living expenses, considering the parties' marital standard of living. The district court further found that respondent had $2,322 net monthly income. Although respondent obtained the education and employment contemplated and required by the J&D, that work was only partially self-supporting—given the parties' martial standard of living, she would never be fully self-supporting.

Given her lengthy absence from the workforce, age, and inexperience in her new position, the district court found that respondent's earning capacity was permanently

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whether a party has demonstrated need based on the standard of living established during the marriage. This inquiry was adequately carried out by the district court in this case.

diminished, hindering her ability to become self-supporting. Appellant furthered his education and career while respondent cared for the parties' minor children.

With respect to appellant, the district court found that he presently had approximately $7,828 in net monthly income and reasonable monthly expenses of $4,609. Because appellant did not submit a monthly budget, the district court adopted his claimed expenses in the J&D. Given appellant's net monthly income and reasonable monthly living expenses, appellant had the ability to pay spousal maintenance.

In summary, we conclude that the district court acted within its discretion when it found that respondent has reasonable monthly living expenses, considering the standard of living established during the marriage, of $4,675. The district court's determination that respondent needs spousal maintenance in the amount of $2,500 is supported by the record. Accordingly, we conclude that the district court did not abuse its discretion in awarding respondent permanent spousal maintenance.

Affirmed.