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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-783**

In re the Marriage of:
William Ernest Hemp, petitioner,
Appellant,

vs.

Helen Ileene Hemp,
Respondent.

**Filed April 27, 2010
Affirmed in part, reversed in part, and remanded
Schellhas, Judge**

Anoka County District Court
File No. 02-F9-96-10620

Douglas G. Sauter, William D. Siegel, Barna, Guzy & Steffen Ltd., Minneapolis, Minnesota (for appellant)

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Considered and decided by Lansing, Presiding Judge; Kalitowski, Judge; and Schellhas, Judge.

UNPUBLISHED OPINION

SCHELLHAS, Judge

In this spousal-maintenance modification dispute, appellant-husband challenges the district court's order, arguing that the district court erred by (1) not terminating husband's maintenance obligations; (2) overstating the value of husband's pension

interests; (3) requiring husband to pay conduct-based attorney fees; and (4) requiring husband to pay maintenance through income withholding when the question was not properly before the district court. We affirm in part, reverse in part, and remand to the district court.

FACTS

Appellant-husband William Ernest Hemp and respondent-wife Helen Ileene Hemp were divorced in July 1997, based on their stipulation. Husband moved the district court to vacate the stipulation and judgment and for amended findings or a new trial. The district court denied husband's motion¹ but amended the judgment to correct a legal description. The district court issued an amended judgment with corrected conclusions of law on November 21, 1997.

Judgment

The findings of fact in the parties' judgment of marriage dissolution state that husband was employed as a construction supervisor, earned a gross income of \$4,330 per month, and had necessary monthly expenses of approximately \$2,306. Wife had been employed as a secretary, had earned a gross income of \$1,840 per month, was on disability leave, and had necessary monthly expenses of approximately \$3,099. Based on the parties' stipulation, the district court ordered husband to pay wife permanent spousal maintenance of \$1,030 per month and maintain a life-insurance policy to secure his maintenance obligation.

¹ Husband appealed the district court's denial of his motion to vacate the stipulation, and this court affirmed. *Hemp v. Hemp*, No. C7-97-2207, 1998 WL 404979 (Minn. App. July 21, 1998).

Husband had a pension through the Carpenter and Joiner's Union with a value of \$196,305 as of March 31, 1997, based on a retirement age of 60. As part of the parties' property division, wife was awarded \$76,500 from husband's pension and husband was awarded the balance of \$119,805.

Motion to Terminate Maintenance

On May 4, 2007, husband moved the district court to terminate his spousal-maintenance obligation and his obligation to maintain life insurance to secure the obligation. Husband supported the motion with an affidavit in which he stated that he was retiring on July 1, 2007, when he turned 60. He stated that the loss of his salary was a substantial change in circumstances and that his income under his pension was considered property for purposes of the dissolution judgment and therefore not income available for maintenance.

In connection with his motion, husband alleged that in 2006: (1) wife's gross earnings were \$35,995.81; (2) she had rental income of \$5,341.70; and (3) she received a pension distribution of \$9,342 from the portion of his pension awarded to her and deposited it in her individual retirement account (IRA). He also argued that wife's estimated expenses were "totally out of line."

Wife opposed husband's motion and moved for attorney fees. Wife supported her counter-motion with an affidavit in which she stated that without maintenance she could not meet her expenses. She also stated that, since 1999, she had been employed as a child-care-assistance consultant at a non-profit organization. Wife attached W-2 statements for 2004 through 2006, reflecting taxable employment income ranging from

\$25,414 to \$26,221, and a 2007 paystub reflecting gross income of \$2,749 per month. Wife reported that although she had rented out her basement for three years, the rental resulted in a loss each year and damage to her house that had not been fully repaired. Wife stated that, since the dissolution, her expenses had increased by \$1,800 per month and exceeded her income. She also stated that she deposited her portion of husband's pension distributions into her IRA.

Wife argued that only a portion of husband's pension distribution constituted a property award to husband and that the balance was income available for maintenance.

My attorney's old files produced a document from the Twin Cities Carpenter's and Joiner's Union, showing the amount Steele Construction contributed to the Union on [husband's] behalf at the time of the Decree. (**Exhibit L** which also evidences the "normal" retirement age of 62.)

According to this Exhibit, the contribution ten years ago was \$61,151.87. 39% of that **contribution** was awarded to me as property, a total of \$23,849.23. (**Exhibit M** This amount was present-valued by an actuary to be \$76,500. Incidentally, the actuary provided present day calculations for age 60, 62, 65, and 67. Age 60 was used as a valuation date because it calculated-out at the highest present value, not because there was any understanding that Petitioner would retire at age 60).

At the time of the Decree, [husband] was awarded 61% of the employer contributions, a total of \$37,302.64 (present-valued at \$119,805.00).

According to this Exhibit, [husband's] monthly Pension benefit is calculated at 4% of the employer contribution allocated to him, i.e., \$37,302.64. 4% of that amount is \$1,492.08 as a monthly pension benefit to [husband].

This amount—and this amount only—represents the portion of Petitioner’s monthly retirement benefit that is **property** and cannot be characterized as income for spousal maintenance purposes.

Denial of Maintenance Modification

On October 18, 2007, the district court denied husband’s motion, concluding that a portion (\$4,127.12) of the monthly pension distribution to husband was income available for maintenance. The district court said:

The parties, through agreement at the time of the dissolution, chose to value [husband’s] pension interest as determined by an actuary at the time of [husband’s] age of 60 (which happens to be 2007). The Court chooses to apply the same rationale and exempt [husband’s] share of the property division using the value as determined at the time of the dissolution (61% of the future-valued \$196,305 which equals \$119,805). Using the attached life expectancy table, [husband’s] pension payments can be expected to continue until July 2027 (the age of 80). The total value of these payments is \$1,110,312 ($\$4,626.30 \times 12 \text{ months} \times 20 \text{ years}$). The property share of this total is 10.79% ($\$119,805 / \$1,110,312$). Therefore, the property share of [husband’s] pension is \$499.18 per month ($.1079 \times \$4,626.30$). This amount cannot be included in calculating spousal maintenance. The amount of [husband’s] pension payments that will be considered income is \$4,127.12 ($\$4,626.30 - \499.18).

In determining the amount of husband’s monthly distribution that was income available for spousal maintenance, the district court did not discount the value of the pension to determine its present value, as an actuary had done in 1997. Based on its valuation of husband’s pension, the district court concluded that husband’s circumstances had not changed substantially and that the original award remained reasonable and fair. The

court also concluded that husband should continue to maintain a life-insurance policy to secure his maintenance obligation. The court denied wife's motion for attorney fees.

Motion for Amended Findings

Husband moved the district court for amended findings, arguing that: (1) he is entitled to receive the actuarial equivalent of the pension amount awarded to him before any amount of his pension distribution could be considered income; (2) the court erred in determining the value of his pension to be over \$1,000,000; and (3) the court erred in finding that wife had a continued need for spousal maintenance. Husband submitted a new affidavit detailing that he would retire at the end of December 2007 and included an updated benefit estimate for his pension, which would take effect January 1, 2008.

Wife moved the district court to deny husband's motion for amended findings and moved for an award of need- and conduct-based attorney fees. The court awarded wife \$2,000 in attorney fees, "based on what would be considered litigious nature," noting at the hearing that husband had "challenged every cost of living increase in the maintenance except for the last time, and that's when you brought this motion."

March 5, 2008 Order

The district court signed wife's proposed order on March 5, 2008. The court rejected each of husband's proposed amended findings and found that wife had a continued need for maintenance. The court also found that husband's pattern of litigiousness had contributed to the length and expense of the proceeding and awarded wife \$2,000 in attorney fees. The order includes a new maintenance figure, after a cost-

of-living increase, to be paid via “Automatic Income Withholding through [husband’s] employer or Pension.” This appeal follows.²

DECISION

I. Spousal Maintenance

Modification of maintenance is reviewed for an abuse of discretion. *Youker v. Youker*, 661 N.W.2d 266, 269 (Minn. App. 2003), *review denied* (Minn. Aug. 5, 2003). A district court abuses its discretion by awarding spousal maintenance when it makes findings unsupported by the evidence or when it improperly applies the law. *Dobrin v. Dobrin*, 569 N.W.2d 199, 202 & n.3 (Minn. 1997).

“A party moving to modify an award of maintenance bears the burden of showing a substantial change of circumstances since the last time maintenance was modified, or if maintenance has not been modified, since it was originally set.” *Youker*, 661 N.W.2d at 269. “The moving party must then demonstrate that these changed circumstances render the original award unreasonable and unfair.” *Id.* Changed circumstances that will justify modification include substantially increased or decreased income or expenses of either party. Minn. Stat. § 518A.39, subd. 2(a) (2008).

² Husband appeals from: (1) the district court’s order of October 18, 2007, denying his motion to terminate his spousal-maintenance obligation; and (2) the district court’s order of March 5, 2008, denying his motion for amended findings. This court questioned whether the award of attorney fees in the March 5 order was appealable but ultimately decided to extend review to the fee award.

A. Pension Benefits as Income

At the time of oral argument, husband argued that the district court abused its discretion in the October 18, 2007 order by ruling that a portion (\$4,127.12) of his monthly pension benefit (\$4,626.30) was income available for maintenance and that only the portion (\$499.18) of husband's monthly pension benefit attributable to the property award was property awarded to him and therefore unavailable for payment of maintenance. At the time of oral argument, review of this court's decision in *Lee v. Lee*, 749 N.W.2d 51 (Minn. App. 2008), was pending before the supreme court. In *Lee*, this court held that until the maintenance obligor received the full value of the portion of his pension benefits awarded to him under the original dissolution judgment, any benefits he received constituted marital property previously awarded to him and was therefore unavailable as income for spousal maintenance. 749 N.W.2d at 57. Because of the pending review of *Lee* before the supreme court, this court stayed this appeal pending the supreme court's decision in *Lee*.

The supreme court issued its decision on December 3, 2009. *Lee v. Lee*, 775 N.W.2d 631 (Minn. 2009). The supreme court stated that this court, relying on *Kruschel v. Kruschel*, 419 N.W.2d 119, 121 (Minn. App. 1988) and *In re Marriage of Richards*, 472 N.W.2d 162, 165 (Minn. App. 1991), had "adopted a no-apportionment rule, holding that all of the obligor's pension payments must be considered part of the obligor's property award until the sum of the payments exceeds the total award." *Id.* at 641. The supreme court noted that the parties in *Lee* "agree[d] with the rule articulated in *Kruschel* that Minnesota Statutes § 518A.39, subd. 2(f), prohibits district courts from using pension

payments as an income source for maintenance when the same pension benefits were previously awarded to the obligor as marital property.” *Id.* The supreme court said that “the no-apportionment rule adopted by the court of appeals in *Kruschel*, as applied in this case, goes far beyond what is required to protect [husband’s] interest in his property award.” *Id.* The supreme court reasoned that allocating the entirety of the monthly pension payment to the obligor as property was artificial because the total payment received represented “the cumulative benefit earned by [the obligor] for work performed throughout his career—before, during, and after his marriage.” *Id.* The supreme court concluded that “a district court may include in its calculation of an obligor’s ability to pay maintenance the portion of an obligor’s monthly pension payment exceeding the amount the obligor is entitled to receive each month as marital property.” *Id.*

The parties then submitted supplemental briefs addressing the applicability of the supreme court’s opinion in *Lee*. Based on the supreme court’s decision in *Lee*, husband no longer argues that he must receive the full amount of his pension benefits awarded to him in the original judgment before any other benefits he receives can be considered in determining his ability to pay spousal maintenance. Based on *Lee*, we conclude that, except for valuation as discussed below, the district court did not err by identifying the portion of husband’s monthly pension benefit that was awarded as marital property, and we affirm the district court’s apportionment approach to determining that a portion of husband’s monthly pension benefit is available as income for spousal maintenance.

B. Current Value and Property Portion of Pension

Post-*Lee*, husband continues to challenge the district court's valuation of the present value of his pension and its calculation of the property portion of his monthly pension benefit, as set forth in the court's October 18, 2007 order. Valuation of pension benefits is generally a matter for the district court's discretion. *Taylor v. Taylor*, 329 N.W.2d 795, 798 (Minn. 1983). A district court's valuation of assets does not need to be exact. *Johnson v. Johnson*, 277 N.W.2d 208, 211 (Minn. 1979). The district court need only arrive at a value that lies within a reasonable range of figures. *Id.* The district court's valuation "should be supported by either clear documentary or testimonial evidence or by comprehensive findings issued by the court." *Ronnkvist v. Ronnkvist*, 331 N.W.2d 764, 766 (Minn. 1983).

In this case, the only support for the district court's valuation was its explanation that it used the same method that the parties used when the pension was valued for purposes of the original judgment. The district court concluded that in 1997, the parties chose to "future value" the pension, determining the value at the time of husband's retirement at age 60. "Because interpretation of a written document is a question of law, we do not defer to the district court's interpretation of a stipulated provision in a dissolution decree." *Anderson v. Archer*, 510 N.W.2d 1, 3-4 (Minn. App. 1993) (stating also that if a judgment is ambiguous, then a district court's interpretation is sometimes treated as a question of fact).

We conclude that the original dissolution judgment is not ambiguous about whether the value of husband's pension was a "future value"; the value set forth in the

judgment was not a “future value.” We therefore review the district court’s interpretation of the pension value de novo. The original judgment states that the pension had “a value of \$196,305, *as of March 31, 1997*, using a retirement age for [husband] of age 60.” (Emphasis added.) The inclusion of a 1997 valuation date indicates that the figure was a present-value figure. “‘Present value’ discounts an award to that amount which, *if presently received*, could be invested in order to yield the future sum.” *DuBois v. DuBois*, 335 N.W.2d 503, 506 (Minn. 1983). Because the district court’s interpretation of the valuation method used in the decree is contrary to the original dissolution judgment, the court erred in its interpretation. And, even if the district court’s interpretation of the original judgment is treated as a factual finding, it fails under the higher clear-error standard. In the affidavit that wife submitted to the district court, wife explained the valuation method and stated that the figure in the decree was a present-value figure calculated by an actuary. Because the district court’s interpretation of the figure is contrary to the extrinsic evidence and unsupported by any other evidence, it is clearly erroneous.

The error in the interpretation of the decree leaves the district court’s valuation method and calculation of the marital-property portion of the monthly pension benefit without support. Because the district court’s valuation and calculation of the marital property portion are without support from evidence or adequate findings, the district court abused its discretion. *See Ronnkvist*, 331 N.W.2d at 766 (stating that valuation of an asset should be supported by testimonial or documentary evidence or comprehensive findings). We therefore reverse and remand this issue to the district court.

Husband also argues that the district court erred by not appointing an actuary under Minn. Stat. § 518.582, subd. 1 (2008). Under that subdivision, the district court “may” appoint an actuary to value pension benefits. “May” is permissive. Minn. Stat. § 645.44, subd. 15 (2008). Because the statute does not require appointment of an actuary, the district court did not abuse its discretion by not appointing an actuary to provide a present value of the pension. On remand, the district court may exercise its discretion to appoint an expert to value husband’s pension and provide a present value.

C. Continued Need for Maintenance

Husband argues that the district court’s findings regarding wife’s earnings and expenses are clearly erroneous and that his modification motion should have been granted on the ground that wife no longer has a need for maintenance. The district court set forth wife’s earnings and expenses in the October 18, 2007 order and, in the March 5, 2008 order, found that wife had a continued need for maintenance. 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).

The district court’s finding that wife’s gross monthly income in 2007 was \$2,745 is not clearly erroneous because it is supported by wife’s paystub showing her earnings in 2007 to be \$2,749.³ Husband argues that the gross pay on wife’s paystub near the end of 2006 indicated that her income was greater than reflected on her 2007 paystub. Husband is correct in this contention, but because the district court confined its finding to 2007 and

³ The discrepancy of \$4 is de minimus.

its finding is supported by the 2007 paystub, the finding is not clearly erroneous. Husband complains additionally that the district court failed to include rental income and pension distributions in wife's income figure. But the district court explained in the March 5 order that wife receives no positive rental income; wife's tax returns from 2004-2006 show a loss from renting her basement. This finding is supported by the record and is not clearly erroneous.

The pension distributions to wife constitute a distribution to her of property awarded to her in the dissolution judgment. The distributions are not income for the purpose of determining wife's need for spousal maintenance. As explained by respondent in her affidavit, dated April 27, 2007, respondent began withdrawing her portion of husband's pension on the advice of her financial advisor, because in the event of her death the benefit is lost to her estate. Wife further explained that, on the advice of her financial advisor, she has rolled the majority of the distributions into an IRA. In its March 5 order, the district court found that the pension funds "are not available to [wife] as 'another source of income' as [husband] suggests. [Wife] has merely changed the address of the retirement property awarded to her ten years ago. She is not in pay status, and there is nothing in the record to support a different Finding, as [husband] requests." We agree. The court's finding is supported by the record and not clearly erroneous.

Husband argues that the district court's findings related to wife's expenses were in error but offers no specific challenge to wife's expenses on appeal. Claims of error unsupported by authority or analysis in husband's brief are "waived and will not be considered on appeal unless prejudicial error is obvious on mere inspection." *Schoepke*

v. Alexander Smith & Sons Carpet Co., 290 Minn. 518, 519-20, 187 N.W.2d 133, 135 (1971). Because the court's findings that wife's expenses exceed her income are supported by the record, we conclude that the district court did not clearly err by concluding that wife had a continued need for maintenance.

II. Attorney Fees

Husband challenges the district court's award of attorney fees in the March 5, 2008 order. The parties agree that the award was a conduct-based award. 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). "An award of attorney fees rests almost entirely within the discretion of the trial 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).

The district court found that husband's pattern of litigiousness unreasonably contributed to the length and expense of the proceeding, citing in particular "the current unfounded requests to have the Court view the same evidence . . . and to determine different conclusions that are more favorable to [husband]." Because this finding is supported by the record, the district court did not abuse its discretion by awarding conduct-based attorney fees.

III. Income Withholding

Husband challenges the portion of the March 5 order stating that a new maintenance figure following a cost-of-living increase was payable "by Automatic

Income Withholding through [husband's] employer or Pension.” Because we are reversing on other grounds, we need not address this issue.

The district court may in its discretion open the record on remand.

Affirmed in part; reversed in part; and remanded.