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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0553**

In re the Marriage of: Michael R. Brooks, petitioner,
Appellant,

vs.

Mary Ellen L. Brooks, n/k/a Mary Ellen L. Barry,
Respondent.

**Filed March 11, 2013
Affirmed in part, reversed in part, and remanded; motion denied
Hooten, Judge**

Hennepin County District Court
File No. 27-FA-10-2004

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Considered and decided by Hooten, Presiding Judge; Connolly, Judge; and
Rodenberg, Judge.

UNPUBLISHED OPINION

HOOTEN, Judge

Husband argues that the district court abused its discretion in awarding spousal
maintenance by failing to find that wife has the ability to be partially self-supporting; by
failing to correctly calculate federal and state income taxes for wife; and by awarding

maintenance which included amounts for savings account contributions and charitable donations. Wife argues that these decisions were correct, but that the district court abused its discretion by imposing a step reduction in maintenance after three years for a presumed reduction in housing costs; by failing to award maintenance which included amounts for the purchase of sports tickets, automobile replacement and repair, and eye care; by failing to award need-based attorney fees to her; by requiring that she pay \$10,000 of husband's attorney fees because of her litigation conduct; and by failing to include the full value of husband's 2010 partnership distribution and employment bonus as marital property.

We affirm the district court's decision declining to impute income to wife because her prospects for becoming partially self-supporting are speculative. Further, we affirm the district court's discretionary decision declining to award specific budget items for automotive expenses, savings contributions, and charitable donations; and we affirm the district court's decision declining wife's request that husband pay need-based attorney fees.

However, we reverse the district court's decision declining to award certain budget items and its determination of an amount for the payment of income taxes. Further, we reverse the district court's decision requiring wife to pay conduct-based attorney fees to husband. We remand only so that the district court may address these deficiencies.

Finally, pursuant to this court's jurisdictional order, we find time-barred wife's challenges to the district court's decision declining to award certain sports tickets, holding that a portion of husband's 2010 partnership distribution and bonus payment

corresponding to the post-valuation date period was nonmarital property, and imposing a reduction in maintenance after three years based on an expected reduction in housing costs.

FACTS

Michael Brooks (husband) married Mary Ellen Brooks, n/k/a Mary Ellen Barry, (wife) on April 12, 1980. While they had four children during the marriage, only the youngest child was a minor during the proceedings and she turned 18 during the pendency of this action. Following the commencement of the dissolution proceedings on November 9, 2009, the parties engaged in extensive discovery and pre-trial discovery disputes. In April 2011, the district court conducted a four-day bench trial, hearing testimony about the parties' spending during the marriage and the need for future expenditures from both parties and their respective financial expert witnesses. The district court also heard testimony from husband's vocational rehabilitation expert about wife's prospects for returning to the labor force.

In an order issued on September 23, 2011, the district court declined to award maintenance for sports tickets, charitable donations, and the full amount of savings contributions, adopted husband's proposed automobile budget for wife, reduced wife's proposed budget for eye care, adopted the conclusion of husband's expert that wife would be able to partially support herself, did not include taxation calculations, and decided that 40.11% of husband's 2010 partnership distribution and bonus were non-marital property. Wife's overall monthly maintenance award was \$14,588 for the first three years, and \$10,171 thereafter to account for an expected reduction in housing costs from wife selling

the home and an influx of income from wife's expected employment. The district court further ordered husband to pay \$31,015 towards wife's attorney fees as an equalizer payment from his marital assets.

Both parties moved for amended findings and the district court filed an amended order on November 18, 2011. The district court again denied maintenance for sports tickets and retained the allocation of husband's 2010 partnership distribution and bonus as non-marital property. But the district court reduced the amount budgeted for eye care, increased the amount budgeted for automobile replacement, decreased the amount for automobile maintenance, included wife's requested amount for charitable donations, included half of wife's requested budget for savings contributions, declined to impute income to wife for future employment, and ordered wife to list the home for sale by March 1, 2013. As a result of these alterations and the decision to include state and federal income tax (at 33% for federal and 7.85% for state), the district court awarded wife spousal maintenance of \$22,000 per month for three years and \$20,169 thereafter, with the reduction stemming from expected reduced housing costs. Further, the district court reversed the attorney fee award of \$31,015, required wife to return those funds to husband, and ordered her to pay \$10,000 for "unreasonably contribut[ing] to the length and expense of this proceeding" by claiming that husband dissipated marital assets.

Both parties then submitted motions for reconsideration. The district court denied these requests, but sua sponte issued a second amended order on which judgment was entered on January 26, 2012. This order retained the first amended order's budgeted amounts for sports tickets, eye care, automobile replacement and maintenance, savings

contributions, and charitable donations, allocated the same portion of husband's 2010 partnership distribution and bonus to non-marital property, again declined to impute income to wife, again ordered wife to pay \$10,000 of husband's attorney fees, and declined to equalize the payment of fees. However, the district court eliminated the order for wife to list the home for sale and altered the investment rate of return. As a result, continuing with the same monthly budget, the district court ordered husband to pay wife \$23,200 in maintenance for the first three years and \$21,000 thereafter. Husband's subsequent second motion for reconsideration was denied.

Husband filed a notice of appeal on March 26, 2012. In an order filed on May 9, 2012, this court questioned jurisdiction and determined that an appeal from the district court's first post-trial order issued on September 23, 2011, was untimely, that judgment was never entered on the first amended order, and that appeal was timely taken from the second amended order. This court thus determined that "our scope of review is limited to the amendments made by the" first and second amended orders.

D E C I S I O N

Appellate review of a district court's maintenance award "is limited to whether the trial court abused its discretion by making findings unsupported by the evidence or by improperly applying the law." *Dobrin v. Dobrin*, 569 N.W.2d 199, 202 (Minn. 1997) (quotation omitted); *see also Lee v. Lee*, 775 N.W.2d 631, 637 (Minn. 2009) (holding that an appellate court will not reverse a maintenance award absent an abuse of the district court's "broad discretion"). A district court does not abuse its discretion unless it arrives at "a clearly erroneous conclusion that is against logic and the facts on record." *Dobrin*,

569 N.W.2d at 202. “Findings of fact . . . shall not be set aside unless clearly erroneous” Minn. R. Civ. P. 52.01. “Findings of fact are not clearly erroneous unless [an appellate court is] left with the definite and firm conviction that a mistake has been made.” *In re Pamela Andreas Stisser Grantor Trust*, 818 N.W.2d 495, 507 (Minn. 2012) (quotation omitted). The reviewing court views the record in the light most favorable to the district court’s findings and defers to the district court’s credibility determinations. *Vangsness v. Vangsness*, 607 N.W.2d 468, 472 (Minn. App. 2000). But statutory construction is a question of law that this court reviews de novo. *Lee*, 775 N.W.2d at 637.

The maintenance statute provides that a district court “may” order temporary or permanent maintenance as “the court deems just,” based on two alternative grounds:

[I]f [the district court] finds that the spouse seeking maintenance:

(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, subs. 1–2 (2012). “The purpose of a maintenance award is to allow the recipient and the obligor to have a standard of living that approximates the marital standard of living, as closely as is equitable under the circumstances.” *Melius v. Melius*, 765 N.W.2d 411, 416 (Minn. App. 2009) (quotation omitted).

In making a maintenance award, the district court must “consider[] all relevant factors including” the factors enumerated by the maintenance statute. Minn. Stat. § 518.552, subd. 2. “The issue is, in essence, a balancing of the recipient’s need against the obligor’s ability to pay.” *Prahl v. Prahl*, 627 N.W.2d 698, 702 (Minn. App. 2001); *see also Erlandson v. Erlandson*, 318 N.W.2d 36, 39–40 (Minn. 1982) (noting that, under maintenance statute, “the issue is basically the financial needs of [one spouse] and her ability to meet those needs balanced against the financial condition of [the other spouse]”). “[N]o single statutory factor . . . is dispositive,” and “each case must be determined on its own facts.” *Erlandson*, 318 N.W.2d at 39.

I. The district court did not abuse its discretion in declining to impute income to wife based on expected future employment.

Husband argues that the district court erred by declining to impute income to wife, claiming that wife may be retrained, obtain employment, and become partially self-supporting. Although wife had worked as a registered dietician in the early years of the marriage, she quit working outside of the home in 1989 so that she could work as a fulltime homemaker and stay at home with her children.

A district court is authorized to order spousal maintenance if, “considering the standard of living established during the marriage,” the “spouse seeking maintenance . . . lacks sufficient property, including marital property apportioned to the spouse, to provide for reasonable needs of the spouse . . . , or . . . is unable to provide adequate self-support, after considering . . . all relevant circumstances, through appropriate employment.” Minn. Stat. § 518.552, subd. 1 (2012). However, to the extent it is relevant, the district

court must consider “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.” *Id.*, subd. 2(b) (2012).

Husband argues that, because there was some evidence that wife could potentially obtain employment, the district court is required to impute some income to wife under *Passolt v. Passolt*, 804 N.W.2d 18 (Minn. App. 2011), *review denied* (Minn. Nov. 15, 2011). In *Passolt*, the district court declined to impute income to the maintenance recipient because it believed imputation was allowed only on a finding of bad faith or intentional underemployment. *Id.* at 21. But this court held that a district court could impute income without such a finding based on the statutory language indicating that the probability that a recipient will become self-supporting is a relevant factor in awarding spousal maintenance. *Id.* at 25. While the parties argue about the application of *Passolt*, that case represents only a correction of a misunderstanding of the law (that a finding of bad faith is required to impute income to a maintenance recipient), rather than a broad holding that a district court must impute income where there is a reasonable probability that such income is earnable. Indeed, the *Passolt* court remanded so that the district court could decide whether evidence supported using expected income to reduce the amount of maintenance. *Id.*

Husband argues that this case is factually similar to *Passolt* and that this court must reverse the district court’s decision declining to impute income to wife. But, as is evident from a review of the record, this case is analogous to other cases in which the

maintenance recipient's ability to earn income was speculative. *See, e.g., Nardini v. Nardini*, 414 N.W.2d 184, 197 (Minn. 1987) (concluding that, where wife had a high school degree and "a 30-year hiatus in [her] employment history," it was speculative whether she would be able to find employment and how much she would be able to earn); *Frederiksen v. Frederiksen*, 368 N.W.2d 769, 776 (Minn. App. 1985) (reversing the trial court's finding that wife would be able to earn future income through employment as "too speculative" where evidence showed that wife's employment prospects were "less than promising"). Here, the district court made several findings in its amended orders regarding the possibility that wife would return to the labor force. The district court based its findings on the evidence and testimony presented by husband's vocational rehabilitation expert. In these findings, the district court noted several facts indicating that wife's successful return to the labor force as a dietician is not a foregone conclusion, in particular that the labor market in wife's field is "very competitive" and "saturated," that a significant portion of available jobs are part time, and that older workers experience more difficulty finding work than younger workers. As a result, the district court found that it was "questionable whether [wife] will be able to find a part-time job as a dietician, much less a full time job." While there was conflicting evidence and testimony that wife would be able to find employment in her chosen field with a year of re-education, there was evidence to support the district court's findings. Therefore, those findings are not clearly erroneous, and, as a result, the district court's decision declining to impute income to wife complies with the statutory direction to consider the

“probability” that wife could support herself through employment, and is within the district court’s discretion.

II. The district court abused its discretion by including income taxes and certain budget items in spousal maintenance.

A. Income Taxes

Husband argues that the district court erred in its determination of the amount of federal and state income taxes included in the maintenance payments. In its first order, the district court disregarded federal and state income taxes when calculating maintenance. In both amended orders, the district court applied a flat 33% and 7.85% tax rate for federal and state taxes, respectively. Husband argues that this calculation significantly overstates wife’s tax liability because it does not account for deductions and fails to correctly apply the tax rates to the amount of income.

A district court is not required to take tax consequences into consideration when determining what amount of spousal maintenance to award. *See Maurer v. Maurer*, 623 N.W.2d 604, 607 (Minn. 2001) (recognizing the district court’s discretion to consider tax consequences in rejecting a bright line rule about when taxes should be considered); *Dahlberg v. Dahlberg*, 358 N.W.2d 76, 82 (Minn. App. 1984) (“It is within a court’s discretion to consider the tax consequences of its actions.”). The district court may consider the tax consequences of a maintenance award when it has a “reasonable and supportable basis for making an informed judgment as to the probable liability.” *Kampf v. Kampf*, 732 N.W.2d 630, 635 (Minn. App. 2007) (quotation and alteration omitted), *review denied* (Minn. Aug. 21, 2007). But the court should not be required to speculate

regarding the tax consequences of its decision. *See Miller v. Miller*, 352 N.W.2d 738, 744 (Minn. 1984) (discussing tax consequences of property division).

Husband asserts that when the tax consequences are correctly calculated, wife is only entitled to monthly maintenance of \$19,352, rather than the \$23,200 awarded by the district court. The higher amount, according to appellant, results in an overpayment of \$3,848 per month, gross, and \$2,171 per month, net. Wife does not dispute that the district court's calculations result in an overpayment, but argues that this overpayment is within a reasonable range.

The district court's tax calculation is not in accordance with the facts and applicable law. *See Dobrin*, 569 N.W.2d at 202 (noting that appellate courts review discretionary decisions for "whether the trial court abused its discretion by making findings unsupported by the evidence or by improperly applying the law." (quotation omitted)). First, the district court's calculation bears no resemblance to the calculations submitted by the parties to the district court. Both parties submitted estimates of wife's tax liability, in which the effective tax rates were all below 34.5%. In contrast, the district court applied a 40.85% rate to account for potential tax liability. While we recognize that the utility of the parties' estimates was limited because some of the assumptions underlying those calculations were not adopted by the district court, the district court ignored those estimates and substituted its own calculations. Thus, there is no evidentiary support for the district court's calculation. Because of the amounts involved, the difference is significant. Husband offers a new tax calculation on appeal, but adopting that is within the district court's discretion. However, this indicates that the

parties could have provided evidentiary support for the district court's calculation of tax liability in the maintenance award had they been asked to do so.

Second, the tax rate estimates offered to the district court, as well as husband's calculations on appeal, are based on state and federal tax law. *See* I.R.C. § 1(a)–(e) (West 2012) (listing the amounts and rates of tax for various amounts of income and for various filing statuses); Minn. Stat § 290.06, subd. 2c (2012) (same for state taxes). The same is true for potential deductions. *See* I.R.C. §§ 151, 164, 170 (West 2012) (deductions for personal exemption, state income tax, personal property tax, real estate tax, and charitable contributions). But the district court's order regarding its tax calculation neither references any specific federal or state tax law supporting its finding, explains why the tax calculations presented by the parties' experts were unacceptable, nor justifies why its calculation yielded a tax liability that was larger than that found by either expert.

Under these circumstances and based upon the record in this case, we reverse the district court's finding of tax liability. However, in so doing, we do not intend to suggest that the district court must engage in a detailed analysis of wife's income tax liability. Such an analysis may be burdensome for the court and may encourage the parties to seek maintenance changes based on changes to the underlying tax laws. We continue to afford the district court discretion to determine the tax liability of wife's receipt of maintenance in an amount within a reasonable range of income tax liability, should the district court choose to apply such an analysis. But in this case, the district court estimated the tax liability for a maintenance award that exceeded the calculations provided by the parties'

experts by several percent, which resulted in a significant overpayment of maintenance. Because the district court's calculation was unsupported by the evidence, and the district court failed to refer to the applicable tax law utilized by in its independent calculations or explain why its calculation differed significantly from the experts' calculations, the district court abused its discretion. On remand, the district court has discretion to allow the parties to submit new tax liability calculations.

B. Budget Items

The district court chose to specifically designate reasonable budgeted amounts for various disputed expenditures. This approach is not required, but when it is used, the district court is bound to logic and evidence. *See Dobrin*, 569 N.W.2d at 202 (noting that a "clearly erroneous conclusion that is against logic and the facts on record" is an abuse of discretion). In this case, the district court's decisions on two items lack a sufficient factual basis.

First, wife's proposed budget contained an item for Vikings tickets. The district court's first order did not address whether those tickets were part of the marital standard of living, as it had for other ticket expenses, but did include an amount labeled "Vikings Tickets" in that order's itemized budget. The first amended order did not include this item and did not include findings on Vikings tickets or otherwise explain this absence. The second amended order noted:

It has come to the Court's attention the J&D contained a clerical error in Finding of Fact XXV. The chart summarizing Ms. Brooks' budget contained an extra \$203 allocated to Vikings tickets. The Court did not intend to include an allowance for Vikings tickets. [Wife's counsel]

apparently added the amount Ms. Brooks' budget increased from the J&D to the First Amended J&D, and added that number to the total amount from the summary table in Finding of Fact XXV of the original J&D. However, this calculation incorrectly includes \$203 for Vikings tickets.

While clarifying that the district court did not intend to include an amount for Vikings tickets in the maintenance budget, this statement does not adequately explain the reason for the decision. The statement does not reference any facts or evidence and does not analyze whether the tickets were part of the marital standard of living. In fact, the basis for such a decision is unclear, considering that husband's proposed budget included wife's requested amount for Vikings tickets. Considering the agreement by the parties on that amount, we conclude that the district court's decision to exclude the amount was an abuse of discretion.

Wife also argues that the district court abused its discretion by awarding \$35 per month for eyeglasses and contacts. The district court arrived at this number by halving the family's average monthly vision expenses. But that decision is not supported by the record. Wife indicated that she spent \$1,000 for glasses every two to three years and \$350 for contacts every six months. Husband testified that he was not aware that anyone in the family wore glasses and therefore disputed the budget for these items. But the expense report submitted by husband clearly shows eye-care expenses. Because wife testified that these were her expenses and husband testified that he did not wear glasses and did not believe anyone else in the household did, the only conclusion is that these eye-care expenses were solely incurred by wife. As a result, the district court's decision

that only half of those expenses would maintain the marital standard of living is an abuse of discretion.

III. The district court did not abuse its discretion by including other budget items in the maintenance calculation given the marital standard of living.

Wife challenges the district court's determination of an appropriate amount for automobile replacement and maintenance, arguing that the district court did not adhere to the marital standard of living. But the district court awarded an amount that, on this record, was within a reasonable range for those expenses and wife has sufficient means with which to supplement the budgeted amount if she so chooses.

Husband challenges the district court's inclusion of budgeted amounts for savings contributions and charitable donations, arguing, respectively, that wife should use the investment income from the marital property settlement to grow her savings and that he should not be required to pay maintenance so that wife can give it away. The district court justified its award for savings contributions by noting that wife was expected to use the investment proceeds from her property settlement to cover part of her monthly expenses. Thus, as explained by the district court, wife's "invested money will experience smaller growth" than would be expected if she was not using the investment proceeds to pay for expenses.

The parties each cite cases in which this court affirmed the district court's decision to include or exclude savings contributions based on the specific circumstances of the case. *See, e.g., Kampf*, 732 N.W.2d at 634 (affirming district court's inclusion of savings contributions in a maintenance award). But, far from indicating that this court requires

district courts to allow or disallow such amounts universally, these cases indicate that this court will generally defer to the district court's discretionary determination of what is appropriate under the circumstances. Because the parties consistently contributed to savings accounts as part of their standard of living during the marriage, the inclusion of continuing contributions to a savings account in wife's budget was not an abuse of discretion.

Similarly, the district court's decision to include a budget item for charitable giving was not an abuse of discretion. Though husband may correctly assert that wife accrues a tax benefit for making charitable donations, this does not render the inclusion of charitable giving an abuse of discretion. Rather, both parties testified that they regularly donated money to charity, a pattern that is supported by husband's submitted analysis of the family's spending. This supports the district court's exercise of discretion.

IV. Pursuant to this court's jurisdictional order, wife is precluded from challenging determinations that were unchanged from the first order.

In addition to the challenges already discussed, wife challenges a number of other maintenance determinations by the district court. Specifically, she argues that the district court erred by finding that 40.11% of husband's 2010 partnership distribution and bonus payment were nonmarital property; by imposing a step reduction in maintenance in three years based on an expected reduction in housing costs; and by declining to include budget items for sports tickets she argued were part of the marital standard of living.

Those determinations, however, were resolved in the district court's first order, on which judgment was entered on September 23, 2011. The district court's decisions on

these issues were clearly and adequately explained in that order, and while there were slight variations in the explanations of these issues in the subsequent orders, the ultimate results remained unchanged. As a result, we give effect to this court’s jurisdictional order, which stated that, “[b]ecause the parties did not file a timely appeal of the original judgment entered on September 23, 2011, the parties are precluded from raising issues in this appeal that could have been raised in a timely appeal from the original judgment.” Because the decisions on these issues remain unaltered, they are outside the scope of our review, which is limited by the jurisdictional order to “issues directly affected by the amended judgment.”¹

V. The district court did not abuse its discretion by denying wife’s request to require husband to make a need-based attorney fee payment to wife.

Wife argues that the district court abused its discretion by declining to award to her need-based attorney fees under Minnesota Statutes, section 518.14, subdivision 1 (2012). A district court “shall” award attorney fees if it finds

- (1) that the fees are necessary for the good faith assertion of the party’s rights in the proceeding and will not contribute unnecessarily to the length and expense of the proceeding;
- (2) that the party from whom fees, costs, and disbursements are sought has the means to pay them; and
- (3) that the party to whom fees, costs, and disbursements are awarded does not have the means to pay them.

Minn. Stat. § 518.14, subd. 1. The decision to award 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

¹ Accordingly, we deny appellant’s motion to strike a portion of respondent’s brief as barred by this court’s jurisdictional order.

omitted), *review denied* (Minn. Feb. 18, 1999). When considering an award of need-based attorney fees, “there is neither a mandate nor discretion to award such fees without those findings and the evidence to sustain them.” *Mize v. Kendall*, 621 N.W.2d 804, 810 (Minn. App. 2001), *review denied* (Minn. Mar. 27, 2001).

In this case, the district court initially ordered husband to pay \$31,015 to wife as a need-based award of attorney fees. The district court reversed this decision in the first amended order, noting that wife “has the ability to pay [fees] herself.” Indeed, in its second amended order, the district court explicitly considered this in its calculation of husband’s maintenance payments. Thus, wife’s statement that she should not be required to bear the cost of her own attorney fees because “[a]ll of her spousal maintenance and investment income is needed to meet her budget” is plainly incorrect. The district court considered its fee award when calculating maintenance and wife clearly has adequate resources to pay her own fees. Because the district court clearly and correctly found that wife has sufficient means to pay her own attorney fees, the district court did not abuse its discretion in declining to require husband to pay need-based attorney fees.

VI. The district court abused its discretion by requiring wife to make a conduct-based attorney fee payment to husband.

Finally, wife argues that the district court abused its discretion by ordering her to pay \$10,000 towards husband’s attorney fees because of her litigation conduct. A court, “in its discretion,” may award “additional fees, costs and disbursements against a party who unreasonably contributes to the length or expense of the proceeding.” Minn. Stat. § 518.14, subd. 1. The award must be based on specific conduct during the litigation, but

bad faith is not required. *Geske v. Marcolina*, 624 N.W.2d 813, 818–19 (Minn. App. 2001). The decision to award conduct-based attorney fees lies almost entirely within the district court’s discretion. *Crosby*, 587 N.W.2d at 298. The party seeking conduct-based fees shoulders the burden of proving that the other party’s “conduct unreasonably contributed to the length or expense of the proceeding.” *Geske*, 624 N.W.2d at 818.

In response to husband’s request for \$19,875 in conduct-based attorney fees, the district court noted that wife

alleged Mr. Brooks dissipated marital assets. The Court did not find these claims credible or supported by the facts and informed both Parties. The Court also communicated to Ms. Brooks’ counsel, Mr. Grande, that it was inappropriate for Ms. Brooks to attempt to use fault to penalize Mr. Brooks in the division of assets. Mr. Grande subsequently sought a disproportionate share of the marital estate without providing any evidentiary support under Minnesota law for such a position. The Court finds compelling evidence before it that Ms. Brooks unreasonably contributed to the length and expense of this proceeding[.]

As a result, the district court awarded \$10,000 in conduct-based attorney fees to husband.

Wife argues that the claim referenced by the district court—that she was entitled to an unequal distribution of assets because husband dissipated marital assets or committed waste by paying for escort services—was asserted in good faith and did not contribute unreasonably to the length or cost of litigation. Wife notes that the Wisconsin Supreme Court has accepted a proposition that may be analogous to her claim. *See Anstutz v. Anstutz*, 112 Wisc. 2d 10, 13, 331 N.W.2d 844, 846 (1983) (authorizing the district court to consider the “destruction or waste of the marital assets by either party” in determining the contribution of each party to the marriage). Although wife did not

provide precedential case law supporting her argument, she correctly argues that merely asserting a legal claim that may involve an extension of the law does not warrant a conduct-based attorney fee award.

The district court premised its decision on its “communicat[ion]” of its reluctance to hear this claim to wife’s attorney. But wife’s failure to heed this apparently unofficial notification of the district court’s disfavor of this claim does not warrant a conduct-based attorney fee award. Had the district court disposed of this claim in a final order or judgment from which wife could have appealed, the district court may have acted within its discretion, as wife would have been afforded the opportunity to appeal the decision. But without a final determination of her claim, it behooves wife to continue to pursue it or risk that it be considered waived upon appeal. Moreover, despite its stated reticence to consider a dissipation claim based on the use of escorts, the district court allowed testimony on the subject. Thus, while there may have been acrimony between the parties because of this issue, we conclude that the district court abused its discretion by ordering wife to pay conduct-based attorney fees.

In sum, because *Passolt* does not require the district court to impute income to a maintenance recipient, and because the district court’s factual finding that wife’s ability to be partially self-supporting is speculative is not clearly erroneous, we conclude that the district court did not err in declining to impute income to wife in the future. We also conclude that the district court did not abuse its discretion in its budget determinations for wife’s automobile expenses, savings contributions, and charitable donations; or by denying wife’s request that husband pay need-based attorney fees. Further, in light of

this court's prior jurisdictional order, we decline to address several other determinations of the district court, namely, whether the district court's apportionment of husband's 2010 partnership distribution and bonus payment was correct, whether it is appropriate to impose a step-down in spousal maintenance based on an expected decrease in housing costs, and whether it was appropriate to include budget items for sports tickets other than Vikings tickets.

However, we conclude that the district court abused its discretion relative to its findings and conclusions regarding Vikings tickets, wife's eye-care expenses, wife's income tax liability, and the requirement that wife pay conduct-based attorney fees. As a result of our resolution of the various issues in this case, we remand to the district court to recalculate maintenance in accordance with this decision.

Affirmed in part, reversed in part, and remanded; motion denied.