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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A07-1729**

In re the Marriage of:  
Robert Timothy McElroy, petitioner,  
Appellant,

vs.

Rhonda Jane McElroy,  
Respondent.

**Filed September 23, 2008  
Reversed and remanded  
Ross, Judge**

Ramsey County District Court  
File No. F8-06-258

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Considered and decided by Connolly, Presiding Judge; Toussaint, Chief Judge;  
and Ross, Judge.

**UNPUBLISHED OPINION**

**ROSS, Judge**

In this appeal from the district court's judgment and decree dissolving his  
marriage, Robert McElroy challenges the district court's determinations on spousal

maintenance and attorney fees. Because the district court's assessment of Robert McElroy's income, of Rhonda McElroy's income, and of Rhonda McElroy's need for maintenance are based on clearly erroneous findings, we reverse the maintenance award and remand for the district court to recalculate income and reasonable expenses and to reassess maintenance based on those findings. And we conclude that this record does not support an award of conduct-based or need-based attorney fees.

### **FACTS**

This dispute over spousal maintenance and attorney fees arises from the dissolution of Robert and Rhonda McElroy's 29-year marriage in March 2007. The parties reached a stipulated agreement regarding all issues except Rhonda McElroy's request for spousal maintenance. The stipulation included Robert McElroy keeping possession of the vacation home, Rhonda McElroy receiving approximately \$131,000 in proceeds from the sale of the marital home, and the parties splitting equally Robert McElroy's monthly military pension payments of \$1,800.

Robert McElroy served as an officer in the United States Air Force from 1978 until his retirement in 1998. While in the Air Force, he earned a Bachelor of Science degree in management. Throughout most of the marriage, Rhonda McElroy served primarily as a homemaker and also held various part-time jobs, transitioning to full-time employment when the parties' three children grew older. She has no post-secondary degree. In 1999, she began working at an upscale home-furnishings store and was employed there at the time of dissolution.

After trial, the district court ordered Robert McElroy to pay Rhonda McElroy \$1,500 monthly as permanent spousal maintenance because it found that Rhonda McElroy could not meet her monthly living expenses without financial assistance from Robert McElroy. In determining this amount, the district court found that Robert McElroy's monthly net income as a customer-service supervisor for 3M is \$6,271.90. It found that with the stipulated pension payments, his net monthly income is \$6,849.25. The court excluded Robert McElroy's claimed expenses concerning the parties' adult son and determined his reasonable monthly expenses to be \$4,796. The court found that Rhonda McElroy earns a monthly net income of \$2,968.12 as a designer at a home-furnishings store. With the stipulated pension payment, her net monthly income is \$3,578.06. The court determined that her reasonable monthly expenses are \$4,644, which exceeds her income by \$1,065.94. The district court also ordered Robert McElroy to pay Rhonda McElroy \$7,500 in attorney fees.

Robert McElroy moved alternatively for amended findings of fact and conclusions of law or for a new trial. The district court issued an amended order in August 2007, essentially reaffirming its findings and conclusions and denying the motion for a new trial. The district court clarified that 60% of the attorney fees ordered were need-based and 40% were conduct-based. It also ordered Robert McElroy to pay an additional \$1,500 in attorney fees. On appeal, Robert McElroy argues that the district court abused its discretion by ordering any spousal maintenance, by ordering maintenance to be permanent in the amount of \$1,500 monthly, and by awarding attorney fees.

## DECISION

We first address Robert McElroy's strong objection to the district court's verbatim adoption of Rhonda McElroy's lengthy and detailed proposed findings of fact and conclusions of law. The district court's analysis varies from Rhonda McElroy's proposed findings and conclusions only slightly to offer a general statement that attorney fees are both need-based and conduct-based. We acknowledge that a district court's "verbatim adoption of a party's proposed findings and conclusions of law is not reversible error per se." *Bliss v. Bliss*, 493 N.W.2d 583, 590 (Minn. App. 1992), *review denied* (Minn. Feb. 12, 1993). But the approach may raise a litigant's suspicion as to whether the district court independently evaluated the evidence and carefully analyzed the issues. *Id.* The supreme court has stated that independent development of findings is the preferred practice. *In re Children of T.A.A.*, 702 N.W.2d 703, 707 n.2 (Minn. 2005). We acknowledge Robert McElroy's argument that this was not the approach taken here. We do not reverse on this basis, but the verbatim adoption of a litigant's presentation precipitates our close review of the challenges raised in this appeal.

### I

Robert McElroy challenges the district court's award of spousal maintenance. We review the district court's spousal-maintenance determination for an abuse of discretion. *Dobrin v. Dobrin*, 569 N.W.2d 199, 202 (Minn. 1997). A district court abuses its discretion if its findings are not supported by the record or if it improperly applies the law. *Id.* at 202 & n.3. We will rely upon the findings of fact with respect to an award of

spousal maintenance unless they are clearly erroneous. *Schallinger v. Schallinger*, 699 N.W.2d 15, 22 (Minn. App. 2005), *review denied* (Minn. Sept. 28, 2005).

Before a district court may order spousal maintenance, it must determine the threshold issue of whether the potential obligee spouse lacks sufficient assets to provide for her own reasonable needs. Minn. Stat. § 518.552, subd. 1 (2006). Because spousal maintenance is awarded to meet need, the award depends on a showing of need. *Lyon v. Lyon*, 439 N.W.2d 18, 22 (Minn. 1989). The district court found that Rhonda McElroy “lacks sufficient property to provide for her reasonable needs” and that her “income, combined with her share of the marital estate, will not provide her with resources sufficient to meet her reasonably necessary monthly living expenses.”

We conclude that the district court made clearly erroneous findings concerning Rhonda McElroy’s need for maintenance because it failed to adequately address factual disputes regarding her marital assets, her ability to provide self-support, and the reasonableness of her expenses. These errors include failing to consider interest income and marital assets available to Rhonda McElroy to meet her needs and inclusion of COBRA health insurance premiums in Rhonda McElroy’s expenses when the record indicates only that she may have been able to obtain health insurance at little or no monthly cost.

### ***Sufficient Assets***

The district court failed to consider potential interest from the marital assets that Rhonda McElroy would receive based on the McElroys’ stipulation when it determined that she lacks sufficient assets to provide for her needs. Rhonda McElroy receives \$900

monthly from Robert McElroy's military pension. She also retained approximately \$203,188 in marital property. This amount includes approximately \$131,000 cash from the net proceeds after the sale of the marital home. Rhonda McElroy used \$53,000 of this sum as a down payment on a home. She testified that she would use the remainder of the proceeds, approximately \$80,000, to pay attorney fees and as a cash reserve in an interest-bearing savings account or in the stock market. The district court failed to address the potential interest income from this asset.

We have previously remanded the issue of spousal maintenance to the district court for failure to include interest income the spouse would earn from her share of a marital property award. *Rask v. Rask*, 445 N.W.2d 849, 855 (Minn. App. 1989); *see also*, *Fink v. Fink*, 366 N.W.2d 340, 342 (Minn. App. 1985) (stating that district court should take interest income that may be generated from marital property award into account when calculating spousal maintenance). Under these facts, the district court erred when it failed to consider interest income. On remand, the district court should address not only this potential interest income but also the effect, if any, of the other marital property awarded to Rhonda McElroy on her ability to meet her own needs.

### ***Self-Supporting***

The district court's conclusion that it is unlikely that Rhonda McElroy "will be able to acquire the necessary training or education to become fully self-supporting" is based on erroneous findings considering "[Rhonda's] age, limited education and training after high school, and employment history." In assessing whether a spouse is self-supporting, the district court generally compares monthly expenses to net monthly

income. See *Erlandson v. Erlandson*, 318 N.W.2d 36, 39 (Minn. 1982) (comparing wife's expenses and monthly salary when determining award of spousal maintenance). The district court found that Rhonda McElroy's net monthly income from employment and from the stipulated pension payments is \$3,578.06 and her reasonable monthly expenses are \$4,644, leaving a deficit of \$1,065.94. But the analysis relies on a factual flaw.

Although Rhonda McElroy lacks a post-secondary degree or job training, at the time of dissolution she earned a salary of approximately \$61,559. This amount is significantly higher than the parties' joint income during the first 20 years of their marriage. This is not a case in which additional training and education are necessary components to self-sufficiency; Rhonda McElroy has already found employment with an income that appears to provide for a standard of living that exceeds the standard she enjoyed during most of the marriage. But we consider whether she can provide adequate self-support based on her amount of reasonable monthly expenses at the marital standard of living. *Id.* Robert McElroy challenges her deduction of COBRA health-insurance premiums from her gross income, as well as her claimed expenses for food, vacations, entertainment, gifts, and miscellaneous items. This challenge has some merit.

#### *Health Insurance*

Robert McElroy contests Rhonda McElroy's expense of \$454 per month for COBRA health-insurance coverage. He argues that because Rhonda McElroy may obtain insurance through the Air Force with little or no premium, her COBRA insurance payment is not a reasonable expense. While the exhibits simply list deductible amounts

and requirements for eligibility for coverage of spouses of Air Force members, Robert McElroy testified that “[t]here is no annual enrollment fee [for the insurance].” Rhonda McElroy testified only that she intended to keep COBRA insurance coverage because she was “concerned” about coverage changes that might result from a switch. But she admitted that before Robert McElroy’s employment at 3M, they maintained coverage under the Air Force insurer. *See Chamberlain v. Chamberlain*, 615 N.W.2d 405, 409–12 (Minn. App. 2000) (discussing importance of the marital standard of living in determining maintenance recipient’s reasonable monthly expenses), *review denied* (Minn. Oct. 25, 2000).

In its amended order, the district court stated that it had “serious questions as to whether or not [Rhonda McElroy], *after the dissolution* of the marriage, could qualify for medical coverage under [Robert McElroy’s] military benefits.” But the exhibit that addresses the issue of coverage indicates eligibility factors that suggest Rhonda McElroy would qualify:

- (1) She must not be remarried.
- (2) She must not be covered by an employer-sponsored health plan.
- (3) She must not be the former spouse of a North Atlantic Treaty Organization or “Partners for Peace” nation member.
- (4) She must meet requirements for the length of marriage, typically 15 or 20 years and the length of the former military member’s length of service.

The court failed expressly to find whether Rhonda McElroy would or would not actually or likely qualify for Air Force insurance. Given that the exhibit and testimony give no indication that she would not qualify, and that they seem to indicate that she would, a

specific finding bolstered by evidence is necessary to support the implied conclusion that she does *not* qualify.

We do not suggest that Rhonda McElroy is precluded from choosing to pay \$454 to continue COBRA insurance coverage regardless of whether the district court includes it as a reasonable expense. But for purposes of determining spousal maintenance, it should not be counted as a reasonable monthly expense or the amount should vary if she qualifies for free or less expensive insurance identical or comparable to her coverage during the marriage. The district court therefore erred by including this as a reasonable expense and, on remand, should either exclude or reduce the cost of the non-Air-Force insurance or make findings explaining the inclusion.

*Other Disputed Expenses*

Robert McElroy asserts that Rhonda McElroy's claim of \$700 monthly for food and household expenses is excessive because she provides only for herself. But his own expense for these categories is \$500, and he gives us no basis to second-guess the district court's allowance for the disparity. Robert McElroy also challenges Rhonda McElroy's claim of \$80 each month for gifts, \$250 for vacations, \$250 for entertainment, and \$100 for miscellaneous expenses. But the court also included Robert McElroy's claimed expenses for his cabin, vacations, entertainment, and boat, totaling \$1,450 monthly (not including the additional expense of utilities at the cabin). Robert McElroy testified that the cabin is a source of entertainment for him, and allowing both parties comparable amounts for vacations and entertainment is neither unreasonable nor inequitable in this

case. The record does not show the district court's inclusion of these expenses for Rhonda McElroy to be clearly erroneous.

### ***Amount and Duration***

Related to the factual error identified regarding health insurance costs, we also conclude that the district court based its determination of the duration and the amount of spousal maintenance on an erroneous finding regarding Robert McElroy's bonus income. Robert McElroy challenges the district court's findings regarding his ability to provide financial support. Specifically, he argues that the district court inappropriately included his pension income when it determined his net monthly income and that the district court erred when it calculated the bonus payments attributable to his monthly income.

After the district court determines that spousal maintenance is appropriate, it must consider several factors to determine the amount and duration of the maintenance award.

*Reinke v. Reinke*, 464 N.W.2d 513, 514 (Minn. App. 1990). The district court

must consider the financial resources of each party, the time the recipient needs to acquire education leading to appropriate employment, the couple's previous standard of living, the duration of the marriage, the length of absence from employment, the age and physical condition of the spouse, the providing spouse's ability to meet both of their needs, and the contributions of the parties in acquiring marital property.

*Id.* at 514–15 (citing Minn. Stat. § 518.552, subd. 2(a)–(h) (2006)). The district court must essentially balance Rhonda McElroy's needs and her ability to meet those needs against Robert McElroy's ability to provide financial support. *Erlandson*, 318 N.W.2d at 39–40. Robert McElroy challenges the maintenance award of \$1,500 and the permanence of the award.

### *Pension Income*

The district court's order provides two calculations of net monthly income available to both parties. One calculation includes pension payments as income and one does not. The court found that by including pension payments, Robert McElroy's net monthly income is \$6,849.25. It found that his net monthly income without the pension payments is \$6,271.90. But when the district court determined whether Robert McElroy would still be able to meet his reasonable monthly expenses while providing \$1,500 in spousal maintenance, it included the pension income. We must determine whether this constitutes error.

In *Kruschel v. Kruschel*, this court held that pension benefits awarded as property in dissolution cannot be included in the income of a party to determine that party's maintenance obligation. 419 N.W.2d 119, 123 (Minn. App. 1988). “[H]owever, his property interest in the pension may, along with [the other spouse's] own assets, be considered in determining the propriety or amount of future maintenance payable from non-pension income.” *Id.* In other words, the pension income may be applied to determine whether an obligor can support himself after paying spousal maintenance, but spousal maintenance may not be ordered to be paid from pension income. Here, the district court explicitly divided the pension as marital property. The district court considered the pension payments when determining whether Robert McElroy can meet his own needs while paying spousal maintenance, and with Robert McElroy's substantial nonpension income, there is no concern that the spousal maintenance would need to be paid from his pension income. The district court did not err when it considered pension

proceeds available to help sustain Robert McElroy after his payment of spousal maintenance from other income.

*Bonus Payment*

Robert McElroy also argues that the district court erred when it calculated the profit-sharing portion of his monthly income. His paystub submitted to the district court showed a year-to-date profit-sharing payment of \$27,565.37 as of November 30, 2006. He testified that he receives quarterly profit-sharing payments, and the district court divided the year-to-date payments by nine, presumably thinking the paystub amount covered only the first three quarters of the year, resulting in monthly profit-sharing income of \$3,062.82. But this was a mistaken division because the evidence indicates that Robert McElroy had received all four quarters of pay for that year by November 30 and would receive no additional payments. The district court should have divided the payment by 12, which would result in monthly profit-sharing income of \$2,297.11.

On balance, because the district court's findings of Rhonda McElroy's expenses and Robert McElroy's income are erroneous, we are unable to meaningfully review the amount and duration of the maintenance award. We therefore reverse, and on remand, the district court should consider Rhonda McElroy's post-dissolution assets, the availability to her and her eligibility for premium-free health insurance, and Robert McElroy's monthly net income after recalculating to account for his actual bonus payments.

## II

We turn to Robert McElroy's challenge to the award of attorney fees. The district court generally has broad discretion to award attorney fees, and this court will not reverse its decision absent a clear abuse of discretion. *Schallinger*, 699 N.W.2d at 24. Attorney fees in dissolution cases are generally governed by Minnesota Statutes section 518.14 subdivision 1, which permits both need-based and conduct-based fee awards. The standards for these awards are different. Minn. Stat. § 518.14, subd. 1 (2006).

### *Need-Based Fees*

The district court "shall" grant need-based attorney fees if it finds that "the fees are necessary to a party's good-faith claim, the party from whom fees are sought has the means to pay them, and the party who seeks the fees does not have the means to pay them." *Schallinger*, 699 N.W.2d at 24 (citing Minn. Stat. § 518.14, subd. 1). The district court's amended findings indicate that 60% of the \$7,500 in awarded attorney fees is need-based. The district court determined that the fees were necessary for the good-faith assertion of Rhonda McElroy's rights, that Robert McElroy has the ability to pay based upon the disparity of income between the parties, and that Rhonda McElroy does not have the means to pay her own attorney fees.

In response to Robert McElroy's motion to amend the findings and conclusions or for a new trial, Rhonda McElroy moved for attorney fees in the amount of \$2,500. In its posttrial order, the district court granted this motion and ordered Robert McElroy to pay Rhonda McElroy an additional \$1,500 in need-based attorney fees. The district court found that Rhonda McElroy's having to respond to the motion for amended findings

“further negatively impact[ed] her financial circumstances” and that “[h]er responses were necessary to assert her good faith rights.”

“Conclusory findings on the statutory factors do not adequately support” an award of need-based attorney fees. *Geske v. Marcolina*, 624 N.W.2d 813, 817 (Minn. App. 2001). But the lack of specific findings on the statutory factors is not fatal to an award when the order reasonably implies that the district court considered the relevant factors, the district court was familiar with the case, and the district court had access to the relevant financial records. *Gully v. Gully*, 599 N.W.2d 814, 825–26 (Minn. 1999). But Rhonda McElroy testified that she would pay her attorney fees from part of her marital property award. And her overall financial need is called into question by the mistaken expense analysis while Robert McElroy’s ability to pay is uncertain given the inaccurate calculation of his income. We hold that the district court therefore lacked a sufficient basis to award need-based attorney fees.

### ***Conduct-Based Fees***

A district 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.” *Geske*, 624 N.W.2d at 818 (quoting Minn. Stat. § 518.14, subd. 1). Because Rhonda McElroy moved for attorney fees, she had the burden of showing that Robert McElroy’s conduct unreasonably contributed to the length or expense of the proceeding. *Id.*

The district court’s amended findings indicate that 40% of the \$7,500 in attorney fees is conduct-based. The district court determined in summary fashion as follows:

The conduct-based award for the sum of \$3,000, or 40% of the costs, is based upon [Robert McElroy's] unreasonable delay, which caused additional expense to [Rhonda McElroy] in order for her to assert her rights in good faith.

The district court failed to identify what conduct led to unreasonable delay. In the original March 2007 order, the court adopted Rhonda McElroy's attorney fee provision verbatim, including apparent errors when distinguishing the parties:

The Petitioner has unnecessarily contributed to the length and expense of this proceeding. Considering the length of the parties' marriage, their respective living expenses, and the substantial disparity in their incomes, the Court finds *Respondent's* refusal to even entertain the payment of spousal maintenance to be unreasonable. The *Respondent's* position is not consistent with well-established law and required Respondent to incur substantial attorneys' fees to litigate this issue.

(Emphasis added.) The only provision in the March 2007 order added by the district court was, "The award is based on needs of [Rhonda McElroy] (respective living expenses and disparity in their incomes) and conduct of [Robert McElroy] (refusal to entertain the payments of spousal maintenance)." Without making findings to identify any conduct as unreasonably contributing to the proceedings, the district court exceeded its discretion when it awarded conduct-based attorney fees. *See Geske*, 624 N.W.2d at 819 (requiring identification of conduct).

Rhonda McElroy offers no legal authority that establishes that the "refusal to entertain the payments of spousal maintenance" unreasonably contributed to the length or expense of a proceeding. Spousal maintenance is not an entitlement. *Harder v. Harder*, 312 Minn. 300, 302, 251 N.W.2d 703, 704 (1977). Parties may stipulate to spousal maintenance or the lack of it, or the district court may determine that spousal

maintenance is inappropriate. Minn. Stat. § 518.552, subds. 1, 5. There is no indication that Robert McElroy failed to cooperate during discovery or that he took positions contrary to well-settled law when he opposed the award of spousal maintenance. It appears that he argued reasonably that Rhonda McElroy may have been self-sufficient and that the district court inaccurately calculated income and expenses. *See Rask*, 445 N.W.2d at 855 (rejecting claim that opposition to an award of permanent maintenance constitutes an unfounded position that unreasonably contributes to the length of or delays litigation). The district court acted outside its discretion when it awarded conduct-based attorney fees based on Robert McElroy's challenges concerning spousal maintenance.

**Reversed and remanded.**