STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0339

In re the Marriage of: Michael A. Spencer, petitioner,
Appellant,

vs.

Kathleen J. Larson,
Respondent.

Filed January 29, 2008
Affirmed in part, reversed in part, and remanded
Minge, Judge

Ramsey County District Court
File No. F8-96-841

Mary Catherine Lauhead, Law Offices of Mary Catherine Lauhead, 3985 Clover Avenue, St. Paul, MN 55127 (for appellant)

Kathleen J. Larson, 3599 Searle Court, Vadnais Heights, MN 55127 (pro se respondent)

Considered and decided by Halbrooks, Presiding Judge; Stoneburner, Judge; and Minge, Judge.

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

MINGE, Judge

Appellant challenges the district court's denial of his motion to eliminate or reduce his spousal maintenance obligation to respondent, arguing that the district court improperly (a) refused to consider respondent's improved economic condition resulting from her cohabitation arrangement; (b) refused to find respondent's 1997 living expenses,

thereby precluding a comparison with her current living expenses; (c) disregarded the opinion of a financial consultant that respondent's claimed present financial situation was not credible; and (d) declined to sanction respondent for failing to comply with discovery requests. Because the district court did not consider whether respondent derived an economic benefit from her cohabitation, we reverse and remand the maintenance issue. We affirm, however, the district court's refusal to reconstruct respondent's 1997 living expenses and its denial of sanctions, and note that the consultant's opinion can be considered on remand.

FACTS

Appellant Michael Spencer and respondent Kathleen Larson are divorced. The February 1997 stipulated judgment dissolving their 26-year marriage required Spencer to pay Larson monthly maintenance of $1,500 until either party's death or Larson's remarriage. It also stated that Spencer's maintenance obligation could be modified as allowed by law. Although the parties had represented their respective living expenses prior to the actual dissolution, neither the stipulation nor the judgment determined the parties' reasonable monthly expenses at the time of separation or dissolution. Pursuant to a motion by Larson, the district court entered an order in October 2005 granting a cost of living adjustment (COLA), which increased Spencer's monthly maintenance obligation to $1,863.

In November 2005, Spencer initiated discovery regarding Larson's finances. In December 2005, Spencer moved to eliminate or reduce his maintenance obligation. He alleged that, since the dissolution, Larson's income had increased while her monthly

expenses had significantly decreased because they were being subsidized by the person with whom she was cohabitating. Larson acknowledged that she co-owned a home and, since 2000, she shared expenses with her cohabitant.

In a July 2006 order, the district court found the following: both parties' incomes had increased significantly since the dissolution; Spencer admitted he was able to pay his $1,836 monthly maintenance obligation; Larson's net monthly income, including maintenance, was $3,579 and her monthly expenses were $4,787; Larson and her cohabitant co-owned a $345,000 home; and "[t]he nature of [Larson]'s relationship with [her cohabitant] is irrelevant to the issues before the Court." The district court concluded that the current spousal maintenance obligation was not unreasonable or unfair and denied Spencer's motion. It also denied a request by Spencer that Larson be sanctioned for failure to provide credit card records and tax returns. This appeal follows.

D E C I S I O N

I.

The first issue is whether the district court improperly failed to consider Larson's cohabitation when it denied Spencer's motion for termination or reduction of maintenance. Whether to modify maintenance is discretionary with the district court. *See Rutten v. Rutten*, 347 N.W.2d 47, 50 (Minn. 1984). A district court abuses its discretion if its findings of fact are unsupported by the record or if it improperly applies the law. *Dobrin v. Dobrin*, 569 N.W.2d 199, 202 (Minn. 1997) (quoting *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988)). Our supreme court has made clear that cohabitation, by itself, "is insufficient to justify the termination of alimony" but that a

maintenance recipient's cohabitation should be considered to the extent that it "might improve [the recipient's] economic well-being." *Mertens v. Mertens*, 285 N.W.2d 490, 491 (Minn. 1979); *Sieber v. Sieber*, 258 N.W.2d 754, 758 (Minn. 1977). A remand is required where a district court fails to make adequate findings regarding the economic impact of such a relationship. *Id.*; *Mertens*, 285 N.W.2d at 491.

Here, the record indicates that Larson shares living expenses and receives benefit from her cohabitation arrangement. However, the extent of any economic benefit from her cohabitation and whether such benefit, either by itself or in combination with other changes found by the district court, rendered Spencer's maintenance obligation unreasonable and unfair is disputed. The district court did not address the impact of Larson's cohabitation on her economic welfare. Accordingly, the district court's findings of fact are inadequate to allow review, and we reverse and remand. *See Stich v. Stich*, 435 N.W.2d 52, 53 (Minn. 1989) (remanding where district court failed to make adequate maintenance-related findings).

In remanding, we express no opinion about whether Larson derives an economic benefit from her cohabitation arrangement or whether any such benefit, alone or in combination with other changes, renders Spencer's existing maintenance obligation unreasonable and unfair. On remand, the district court shall address the economic benefits, if any, that Larson receives from the cohabitation arrangement and, if necessary, modify or adjust its maintenance award based on findings of fact supporting the decision. On remand, the district court may reopen the record and direct whatever discovery it deems necessary.

II.

The second issue is whether the district court erred in failing to address the alleged failure of Larson to comply with discovery, including her failure to provide tax returns and credit card statements. Spencer claims that this information would support his claims regarding Larson's expenses and the benefits that she receives from the cohabitation arrangement. On appeal, Spencer argues that the district court should have made adverse inferences against Larson for her failures to comply with discovery.

Generally, Minnesota permits unfavorable inferences against a party who fails to produce evidence within their possession and control. *Federated Mut. Ins. Co. v. Litchfield Precision Components, Inc.*, 456 N.W.2d 434, 436 (Minn. 1990) (quoting *Kmetz v. Johnson*, 261 Minn. 395, 401, 113 N.W.2d 96, 100 (1962)). This duty to make a full disclosure is directly applicable in family proceedings: parties to dissolutions must make a full and accurate disclosure of their assets and liabilities, and a failure to do so justifies inferences adverse to the party who conceals or evades. *Bollenbach v. Bollenbach*, 285 Minn. 418, 428, 175 N.W.2d 148, 155 (1970); *see Doering v. Doering*, 629 N.W.2d 124, 132 (Minn. App. 2001) (discussing affirmative duty to disclose information for parties to family matters regardless of intent to conceal), *review denied* (Minn. Sept. 11, 2001).

Spencer requested sanctions, including negative inferences, because of Larson's failure or unwillingness to produce certain requested documentation explaining her finances, including her financial relationship with her cohabitant. Larson claimed that her cohabitant charged various items using her credit cards, that he paid her $21,500 as

repayment for those charges, and the remaining amount he gave her represented a loan she needed to repay. But Larson did not produce credit card statements itemizing the purchases or provide documentation of amounts the cohabitants owed to one another. Larson now claims to be repaying her cohabitant the loaned money at a rate of $437 per month. Larson stated that she kept running balances in her head. She also indicated that the requested credit card records or tax returns were not in her possession and she did not know who prepared the tax returns. Larson did, however, provide her 2004 tax returns, affidavits, check registers, and earnings statements. Spencer claims that, because the discovery responses were received shortly before the hearing on his motion, he did not have time to obtain authorization from Larson to obtain copies of records from the credit card companies or government agencies.

As stated in *Bollenbach*, full and accurate disclosure of assets and liabilities is of particular importance in the family court setting. *Bollenbach*, 285 Minn. at 428, 175 N.W.2d at 155. Larson has an obligation to be forthcoming with relevant information even in the absence of discovery requests. *Doering*, 629 N.W.2d at 131. At this juncture, we decline to rule that the district court erred in failing to draw adverse inferences against Larson. On remand, the district court will have discretion to allow time for any additional discovery that it deems reasonable and to address any noncompliance with discovery.

III.

The third issue is whether the district court erred by ruling that it would be unduly speculative to determine the parties' 1997 living expenses, which were not included in

the stipulated 1997 dissolution judgment. Maintenance may be modified if a party shows a substantial change in circumstances rendering the existing maintenance obligation unreasonable and unfair. Minn. Stat. § 518.64, subd. 2(a) (2004)[1]; *Hecker v. Hecker*, 568 N.W.2d 705, 709 (Minn. 1997). Changed circumstances include changes in the income or expenses of either or both parties. Minn. Stat. § 518.64, subd. 2(a). Because the 1997 dissolution judgment lacked findings of the parties' then-current monthly expenses, Spencer argues that the district court was required by law to determine those expenses in the current proceeding, that it erred by refusing to find those expenses, and that this error precluded him from showing the existence of a substantial reduction in Larson's expenses. In refusing to find the parties' 1997 expenses, the district court noted that doing this in 2006, nine years later, was too speculative.

Given the importance of having a baseline in evaluating any request for modification of maintenance, the omission from a dissolution judgment of findings of the

[1] The 2004 version of Minn. Stat. § 518.64 governed modification of both child support and spousal maintenance. Significant amendments of the child support system replaced the child support guidelines system, including Minn. Stat. § 518.64, subd. 2 (2004), with an income-shares system. 2006 Minn. Laws ch. 280, §§ 1-47, at 1103-45; 2005 Minn. Laws ch. 164, §§ 4-32, at 1880-1925. These amendments were effective January 1, 2007. 2006 Minn. Laws. ch. 280, § 32, at 1145. Here, use of the definition of "gross income" resulting from the 2005 and 2006 amendments may change the parties' rights. *See* Minn. Stat. § 518A.29 (2006). Generally, courts "apply the law as it exists at the time they rule on a case," unless rights that are affected by an amendment of the law were vested before the law changed. *Interstate Power Co., Inc. v. Nobles County Bd. of Comm'rs*, 617 N.W.2d 566, 575 (Minn. 2000) (stating rule for appellate courts); *McClelland v. McClelland*, 393 N.W.2d 224, 226-27 (Minn. App. 1986) (affirming district court's use of newly enacted amendment on remand as a reflection of the more general principle that a court is to apply the law in effect at the time it renders its decision), *review denied* (Minn. Nov. 17, 1986). Therefore, we apply the 2004 statutes, rather than their successor statutes.

parties' circumstances complicates subsequent proceedings. This situation has prompted prior comment from this court, albeit in the child support context:

> Whether there is a substantial change in circumstances rendering an existing support obligation unreasonable and unfair generally requires comparing the parties' circumstances at the time support was last set or modified to their circumstances at the time of the motion to modify. Unless a support order provides a baseline for future modification motions by reciting the parties' then-existing circumstances, the litigation of a later motion to modify that order becomes unnecessarily complicated because it requires the parties to litigate not only their circumstances at the time of the motion, but also their circumstances at the time of the order sought to be modified.

Frank-Bretswisch v. Ryan, ___ N.W.2d ___, ___, No. 06-1864, 2007 WL 4234420, at *4 (Minn. App. Dec. 4, 2007) (quoting *Maschoff v. Leiding*, 696 N.W.2d 834, 840 (Minn. App. 2005)).

Here, considerations mitigate the effect of the lack of findings of the parties' then-current expenses in the original dissolution judgment and the current district court's refusal to correct that deficiency. The first consideration is Larson's need as affected by her cohabitation arrangement. "[M]aintenance depends on a showing of need." *Lyon v. Lyon*, 439 N.W.2d 18, 22 (Minn. 1989); *see Kemp v. Kemp*, 608 N.W.2d 916, 922 (Minn. App. 2000) (stating that "[a]bsent a demonstrated need [by a maintenance recipient, a maintenance obligor's] continuing maintenance obligation should be terminated."). Here, we are remanding the question of whether Larson derives an economic benefit from her cohabitation and whether any derived benefit, by itself or otherwise, renders Spencer's current maintenance obligation unreasonable and unfair. Therefore, it is premature to

determine whether the district court's failure to find the parties' 1997 then-current expenses was prejudicial error. If the resources Larson has as a result of cohabitation eliminate or substantially reduce her need for maintenance from Spencer, her 1997 expenses may be irrelevant.

Another dimension of need is cost of living. "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." *Peterka v. Peterka*, 675 N.W.2d 353, 358 (Minn. App. 2004). Although he questions certain expenses and the degree to which the expenses Larson actually pays have increased, Spencer does not claim that the overall cost of approximating the marital standard of living has decreased. Indeed, the district court found that since the dissolution the cost of living has increased 25%. That finding is not challenged on appeal.

A third consideration is complexity and uncertainties of trying to reconstruct a budget several years after the fact. The record indicates that the parties' adult children were living with Larson at the time of the dissolution and may have been contributing to payment of certain household expenses. One daughter who lived with Larson in 1997 and participated in the 2005-06 proceeding appeared to be hostile to Larson in this proceeding. Resolving disputes as to 1997-transition living expenses in a residence occupied by several family members is difficult under the best of circumstances. It may become exceedingly difficult after several years when receipts and records are incomplete or testimony of witnesses with conflicting and shifting recollections and

loyalties may be the best evidence available. Although this alone does not allow a district court to disregard the importance of determining expenses, it is a consideration that may affect our willingness to remand with a mandate to calculate those expenses.

Finally, and perhaps most importantly, the parties themselves represented their 1997 expenses during the initial dissolution proceeding. The claimed expenses may provide an admitted baseline for the parties' respective arguments that there has or has not been a change in circumstances in 2006 compared with their (or the others) 1997 expenses. In considering Spencer's motion for modification, the district court may apply estoppel or other principles and rely on those figures. At a minimum, the figures indicate what the parties claimed they spent in 1997 compared with 2006.

Under the unique circumstances of this case, we decline to remand with a requirement that the district court make findings on the parties' 1997 expenses. If, on remand, the district court concludes that it is possible and necessary to make such findings, it is not precluded from doing so.

IV.

The fourth issue is whether the district court erred in disregarding evidence presented by Spencer's financial expert. The expert stated that, based on Larson's claim that she had monthly living expenses of $5,283.70, Larson would need a gross (before tax) annual income of $83,904 to meet her claimed expenses. On appeal, Spencer claims that because the district court failed to mention his expert's analysis in its order, the district court abused its discretion.

Appellate courts defer to district court determinations of the weight and credibility of evidence offered by experts. *See State ex rel. Trimble v. Hedman*, 291 Minn. 442, 456, 192 N.W.2d 432, 440 (1971); *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988) (stating appellate courts defer to a district court's credibility determinations).

Here, while the district court's order does not explicitly mention the affidavit of Spencer's expert, the order does find Larson's current reasonable monthly expenses to be $4,787, almost $500 less than the $5,283.70 claimed by Larson. Spencer claims that Larson's cohabitant has helped her cover these expenses. It is possible that the cohabitant has done so and this assistance, together with the district court's reduction, explain the situation. Perhaps Larson's claimed expenditures are unsustainable. With all the figures and claims in this record, the situation is complex. Without findings by the district court reconciling income and expenditures, we cannot adequately review the question.

We are remanding for the district court to address whether Larson derived an economic benefit from her cohabitation and the impact of that economic benefit on Spencer's support obligation. In making these determinations, the district court needs to make findings regarding Larson's income and expenditures. Although we decline to rule that the district court abused its discretion by failing to explicitly address the affidavit of Spencer's expert, we recognize that, on remand, the district court has discretion to consider the affidavit to the extent it deems that evidence helpful.

Affirmed in part, reversed in part, and remanded.

Dated: