STATE OF MINNESOTA
IN COURT OF APPEALS
A07-682

In re the Marriage of:
John D. Nelson, petitioner,
Appellant,

vs.

Linda M. Nelson, n/k/a Linda M. Voight,
Respondent.

Filed April 15, 2008
Affirmed
Connolly, Judge
Dissenting, Minge, Judge

Ramsey County District Court
File No. F9-93-3040

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Considered and decided by Minge, Presiding Judge; Kalitowski, Judge; and Connolly, Judge.

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

CONNOLLY, Judge

Appellant challenges the district court's order denying his motion to reduce or eliminate his spousal-maintenance obligation to respondent and granting respondent's

motion for attorney fees, arguing the district court clearly erred in finding that respondent's long-term cohabitation did not warrant a reduction or elimination in spousal maintenance. Because deference to the fact finder is appropriate under the circumstances of this case, we affirm.

FACTS

Appellant John D. Nelson and respondent Linda M. Nelson were divorced on October 10, 1994. As part of their divorce decree, appellant was ordered to pay $600 per month in spousal maintenance to respondent. The parties agreed that these payments would only "terminate upon the death of either party or the remarriage of the respondent, whichever first occurs, or further order of this court." As a result of cost-of-living adjustments, appellant currently pays $788 per month to respondent. Respondent was also awarded $645 per month in child support and custody of the parties' remaining minor child. The child has since emancipated, and the corresponding child-support payments have ceased.

Shortly after her divorce, respondent began cohabitating with her boyfriend. When asked about this relationship in a deposition, respondent testified that "short of the paperwork, we are married, short of the license, and we're together for life." Respondent and her boyfriend are joint owners of the homestead she was awarded in the divorce decree. The district court found that respondent's boyfriend contributes $650 per month to respondent. Of this amount, $350 goes towards food, with the other $300 going towards general expenses and rent. Even with this contribution, respondent has a

monthly deficit of about $264.59.[1] During their 25 years of marriage, respondent was primarily a homemaker who helped raise the couple's three children. She has limited out-of-home work experience, no post-high-school education, and has not earned more than $5,185 in income in any year since her divorce.

Appellant has since remarried. The district court found that his reasonable monthly expenses, excluding debt repayments, are $2,271.45, and that his net monthly income is $4,315.78. At the time of the decree, his net monthly income was $2,523.42.

On August 31, 2006, appellant filed a motion in district court to reduce or eliminate his spousal maintenance. The crux of his argument was that respondent's cohabitation with her boyfriend resulted in an improvement in her economic well-being and that this improvement created a substantial change in circumstances that rendered his maintenance obligation unreasonable and unfair. The district court disagreed and denied his motion after finding "no evidence that the respondent's relationship with [her boyfriend] has in any way improved her economic well-being" and that the current circumstances do "not make the present spousal maintenance award unreasonable and unfair." The district court also granted respondent's motion for attorney fees in the amount of $4,400.

[1] The district court found that respondent's reasonable monthly living expenses are $1,396.59 after subtracting her boyfriend's $650 monthly contribution. The district court found that respondent's only sources of income are the approximately $344 per month she receives from babysitting her grandchildren, and the $788 per month in spousal maintenance she receives from respondent. Thus, she receives $1,132 per month in income. Subtracting her total monthly expenses of $1,396.59 yields her a monthly deficit of $264.59.

Appellant challenges the district court's order, taking issue with some of its specific factual findings, its conclusion that respondent's long-term cohabitation does not warrant a reduction or elimination in spousal maintenance, and the award of attorney fees to respondent.

D E C I S I O N

I. Did the district court clearly err when it found respondent's cohabitation does not render appellant's spousal-maintenance obligation unreasonable and unfair?

Minnesota Statutes, section 518.64, subdivision 2(a) [2] reads, in relevant part:

> The terms of an order respecting maintenance or support may be modified upon a showing of one or more of the following:
>
> (1) substantially increased or decreased earning of a party;
> (2) substantially increased or decreased need of a party. . . .

"A movant for maintenance modification must not only demonstrate the existence of a substantial change of circumstances, but is also required to show that the change has the effect of rendering the original maintenance award both unreasonable and unfair." *Beck v. Kaplan*, 566 N.W.2d 723, 726 (Minn. 1997). The decision to modify maintenance is discretionary with the district court. *Rutten v. Rutten*, 347 N.W.2d 47, 50 (Minn. 1984). A district court abuses its discretion regarding maintenance 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). A district court abuses its discretion if it resolves the matter in a manner "that is against logic and the facts on the record." *Id.*

[2] Minn. Stat. § 518.64 was renumbered as Minn. Stat. § 518A.39 effective Jan. 1, 2007.

Minnesota does not recognize common-law marriages, and respondent's cohabitation with her boyfriend is not itself a sufficient reason for reducing spousal maintenance. *Abbott v. Abbott*, 282 N.W.2d 561, 566 (Minn. 1979). However, cohabitation may, in some circumstances, serve as the basis for reducing spousal maintenance payments.

> [T]he existence of a meretricious relationship does not constitute, simply by reason of the nature of the relationship, sufficient ground for the termination of alimony. Where, however, a former spouse's need for support is reduced through such a relationship, modification is appropriate. We affirm our earlier adoption of the rule that a meretricious relationship *may* be a basis for reducing or terminating alimony to the extent it improves a former spouse's economic well-being.

Id. at 566 (emphasis added).

A. The district court did not clearly err in finding the amount of respondent's boyfriend's monthly contribution.

Appellant argues that the district court understated the amount that respondent's boyfriend contributes to her monthly budget. The district court found that respondent receives $650 per month from her boyfriend. Appellant contends this number is actually $1,019 per month. Appellant claims it is clear from his deposition testimony that respondent's boyfriend contributes $269 in utilities in addition to the payments he makes to respondent for rent and expenses. But, respondent's boyfriend gave conflicting deposition testimony on this point, and we defer to credibility determinations made by the district court. *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988). Additionally, appellant argues that the district court should have included an additional $100 in cash

contributions that he claims respondent's boyfriend earns on a monthly basis. Respondent's boyfriend stated in a deposition that he only "occasionally" contributes this additional $100, and, as a result, it was not an abuse of discretion to not include this amount when calculating respondent's boyfriend's monthly contribution.

Appellant also argues that the district court failed to take into account the contributions that respondent makes to her boyfriend's monthly expenses. Specifically, appellant points to the mortgage payments, real-estate taxes, homeowner's insurance, and newspaper subscription paid for by respondent. Appellant argues these payments should be excluded from respondent's budget because they benefit her boyfriend as well as herself. There is no evidence that these payments would cease in the absence of respondent's boyfriend's presence, and we cannot say it was an abuse of discretion to include these expenses in respondent's budget.

B. Impact of respondent's cohabitation.

Appellant finds fault with the district court's finding that: "There is no evidence that the respondent's relationship with [her boyfriend] has in any way improved her economic well-being. If anything [her boyfriend's] contribution substitutes for the child support amount that ended when the minor child emancipated; and barely helps her maintain the 1994 standard of living." Specifically, appellant contends that the district court clearly erred in finding that respondent's boyfriend's monthly contributions do not improve respondent's economic well-being. Appellant also argues that the district court erred by suggesting that respondent's boyfriend's monthly contribution could be characterized as replacing lost child support.

We do not find it necessary to address these contentions, because, even assuming that the district court clearly erred in finding that respondent's economic well-being did not improve as a result of her cohabitation and in suggesting that her boyfriend's payments replaced lost child support, it did not clearly err in finding that "the change in circumstances has not been substantial, and does not make the present spousal maintenance award unreasonable and unfair."

While an improvement in economic well-being resulting from cohabitation may be a basis for reducing or terminating spousal maintenance, the improvement in economic well-being must still create a substantial change in circumstance that has the effect of rendering the original maintenance award both unreasonable and unfair.[3] *Abbott* does not change this rule; it merely makes clear that a change in a party's economic well-being stemming from cohabitation can serve as a basis for finding a substantial change in circumstance. *Abbott* does not hold that a cohabitation-related improvement in economic well-being automatically creates a substantial change in circumstance, or that any change in circumstance renders an existing maintenance obligation unreasonable and unfair. In this case, there is sufficient evidence in the record to affirm the district court's finding that there has not been a substantial change in the parties' circumstances. Even with her boyfriend's contributions, respondent still has a $264.59 shortfall in her monthly budget. Additionally, appellant's net monthly income has increased from $2,523.42 at the time of

[3] Appellant points to other jurisdictions that have specifically provided for cohabitation as a ground for termination of spousal maintenance. Whatever the merits of this approach may be, "the task of extending existing law falls to the supreme court or the legislature, but it does not fall to this court." *Terault v. Palmer*, 413 N.W.2d 283, 286 (Minn. App. 1987), *review denied* (Minn. Dec. 18, 1987).

the divorce decree to $4,315.78 at the present time. Finally, as was the case at the time of the divorce decree, respondent lacks any post-high-school education and any significant out-of-home work experience. These facts, taken as a whole, are sufficient to affirm the district court's decision that there was not a substantial change in the parties' circumstances. Therefore, the district court did not abuse its discretion by denying appellant's motion.

II. Did the district court abuse its discretion in awarding respondent attorney fees?

An award of attorney fees under Minn. Stat. § 518.14, subd. 1 (2006) "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). Section 518.14, subd. 1, provides:

> [T]he court shall award attorney fees, costs, and disbursements in an amount necessary to enable a party to carry on or contest the proceeding, provided 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.

Appellant challenges the award of attorney fees on two grounds. First, appellant argues that a district court, under *Haefele v. Haefele*, 621 N.W.2d 758 (Minn. App. 2001), *review denied* (Minn. Feb. 21, 2001), must indicate to what extent the award is

based on need or conduct. Appellant claims the district court failed to make this finding in its order. Second, appellant challenges the award on the grounds that he brought his motion in good faith, is struggling to make "financial ends meet," and respondent is living beyond her "marital standard."

Concerning appellant's first basis for challenging the award, his reliance on this court's decision in *Haefele* for the proposition that a district court must state to what extent an award for attorney fees is based on need or conduct is misplaced.[4] However, even if this proposition were correct, the district court clearly based the award on respondent's need.[5]

Concerning appellant's second basis for challenging the award, Minn. Stat. § 518, subd. 1 directs a district court, when granting need-based fees, to consider whether: (1) the fees are necessary for the good-faith assertion of the receiving party's rights;

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[4] In *Haefele*, the district court awarded attorney fees based on both need and conduct; however, a portion of the misconduct which served as the basis for the award of attorney fees occurred during a segment of a combined trial which this court later overturned as a denial of due process. *Haefele* 621 N.W.2d at 767. As a result, this court determined that the misconduct which occurred during the overturned portion of the trial could not serve as a basis for the award of attorney fees. *Id.* But because the district court did not specify what percentage of the award for attorney fees was linked to the misconduct which occurred during the overturned portion of the trial, this court concluded it could not discern "whether other conduct would support an award of fees or what portion of [the] entire award is attributable to need based fees." *Id.* Under these circumstances, this court found that effective review was precluded and remanded the issue of attorney fees. *Id.* Thus, *Haefele* does not support the proposition that a district court must, in all cases, indicate to what extent an award is based on need, conduct, or some combination thereof.

[5] The district court found that "[t]he respondent does not have the financial means to pay her attorney fees. The petitioner does have the financial resources to pay a portion of the respondent's attorney fees." No mention of bad faith by appellant was made by the district court.

(2) the party from whom fees are sought has the means to pay them; and (3) the party to whom fees are awarded does not have the means to pay them. Appellant argues that he brought his motion in good faith, is struggling to make "financial ends meet," and respondent is living beyond her "marital standard." First, whether appellant brought his motion in good faith is irrelevant. Minn. Stat. § 518, subd. 1, only directs a court to consider if the fees are necessary for the good-faith assertion of the receiving party's rights. Second, the district court made the determination, supported by facts in the record, that appellant had the means to pay a portion of respondent's attorney fees.[6] Third, whether respondent is living beyond her "marital standard" is also irrelevant under Minn. Stat. § 518, subd. 1, which only directs a court to consider whether the party receiving the award currently has the means to pay her fees.

Thus, under these circumstances, the district court did not abuse its discretion in awarding attorney fees to respondent.

Affirmed.

[6] The district court found that appellant had a net monthly income of $4,315 and monthly living expenses of $2,271.45.

MINGE, Judge (dissenting)

I respectfully dissent. There have been changes in respondent's circumstances since the dissolution that supports reduction, if not cessation, of maintenance. First, the parties' youngest child is emancipated; the respondent has reduced expenses, and also has time available to be employed. A party requesting maintenance is reasonably expected to contribute to her needs by seeking gainful employment. *See Schallinger v. Schallinger*, 699 N.W.2d 15, 22 (Minn. App. 2005), *review denied* (Minn. Sept. 28, 2005) (holding that the district court did not abuse its discretion when it held that maintenance was inappropriate where a person could be self-supporting by working full-time). Even though respondent has limited employment experience outside the home, the record indicates she has been caring for grandchildren for nominal compensation. Although this is laudable and appellant is apparently the grandfather of these children, respondent's decision to receive only nominal payment for a substantial time commitment should be a joint decision of the parties. Absent agreement, it is inappropriate to require one former spouse to pay maintenance so the other does not have to seek any substantial employment for even minimum wage when her health is good and she is no longer responsible for the care of the parties' minor children. *See* Minn. Stat. § 518.552, subds. 1, 2 (2006) (establishing the appropriate grounds upon which to award maintenance).

Second, the record indicates that respondent and her cohabitant are in a stable, long-term relationship and that the reason they are not married is an erroneous belief that she would lose her payment from appellant's social security benefits. She even wears a wedding ring. They have a virtual economic marriage. She has granted, without

monetary consideration, a joint tenancy interest in her principal asset, the parties' former homestead, to her cohabitant. Although her income is admittedly less than her expenses, this negative cash flow has mysteriously not resulted in any accumulation of debt. Her cohabitant's monthly contribution to the household is at least $650, but the record indicates there are additional items he covers. The only explanation for her ability to sustain her weak economic condition without debt is that she and her partner pool their resources; he pays expenses she cannot pay. If appellant's maintenance payments ended or were reduced, respondent's cohabitant would undoubtedly cover all needed expenses.

I agree with the majority that the mere existence of a meretricious relationship does not alone provide for adjustment to or termination of spousal maintenance. *Mertens v. Mertens*, 285 N.W.2d 490, 491 (Minn. 1979). Rather, the affect of such a relationship on the maintenance obligation depends on how much it improves the economic circumstances of the maintenance recipient. *Sieber v. Sieber*, 258 N.W. 754, 758 (Minn. 1977). Here, the impact of the relationship in respondent's situation is dramatic.

I conclude that under the circumstances in this case there has been a substantial change in economic circumstances that should result in the suspension of maintenance. Because respondent's cohabitant does not have a legal liability to support her and that relationship may end, *see* Minn. Stat. § 513.076 (2006) (legislative rejection of palimony), I recognize that appellant's maintenance obligation should not be terminated. Because of the result I reach on the merits, I would not award attorney fees.