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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0796**

In re the Marriage of:
Jana Lou Maxwell, petitioner,
Appellant,

vs.

Robert Eugene Maxwell,
Respondent.

**Filed April 22, 2008
Affirmed
Johnson, Judge**

Hennepin County District Court
File No. 27-FA-000163336

Kathleen M. Picotte Newman, 225 South Sixth Street, Suite 1775, Minneapolis, MN 55402 (for appellant)

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Considered and decided by Ross, Presiding Judge; Wright, Judge; and Johnson, Judge.

UNPUBLISHED OPINION

JOHNSON, Judge

After 33 years of marriage, Jana Lou Maxwell and Robert Eugene Maxwell divorced in 1992, at which time Robert began paying spousal maintenance to Jana. Upon his retirement in 2006 at age 70, Robert moved to terminate the spousal maintenance

obligation. The district court granted his motion. On appeal, Jana argues that the district court made clearly erroneous findings of fact regarding the parties' incomes and expenses and abused its discretion in concluding that continued spousal maintenance would be unreasonable and unfair. We conclude that the district court did not err and, therefore, affirm.

FACTS

Jana Maxwell and Robert Maxwell were married in 1958. They divorced in 1992, when each was 55 years old. They have four children, who now are adults. (For the sake of clarity and simplicity, we will refer to Jana and Robert by their first names in the remainder of this opinion.)

Robert is a physician. At the time of the divorce, he had annual gross earnings of approximately \$296,850. In the last year of his career, his gross income was \$387,766. Jana has a nursing certificate but, at the time of the divorce, was unemployed and appears to have remained unemployed between 1992 and 2006. Under the provisions of the 1992 judgment and decree, Robert's initial spousal maintenance obligation was \$6,000 per month, which was increased only once, in 1994, to \$6,408 per month, as a cost-of-living adjustment.

The stipulated divorce decree provided that Robert's "retirement shall constitute a substantial change in circumstances within the meaning of Minnesota Statutes, Section 518.64" (which has been amended and renumbered section 518A.39). In June 2006, Robert retired. At approximately the same time, he moved to terminate his spousal maintenance obligation and his obligation to pay Jana's health insurance premiums. In

addition to arguing that his retirement was a substantial change in circumstances, Robert argued that Jana's living expenses had decreased and that her income had increased because of her sources of retirement income.

Since retiring, Robert has received monthly income from three sources: (1) his civil service retirement plan (\$2,602); (2) social security retirement benefits (\$1,837); and (3) investment income (estimated to be approximately \$10,800), for a total monthly gross income of approximately \$15,000. The district court found that his monthly net income is approximately \$11,500. Robert claimed \$10,938 in monthly living expenses, but the district court reduced that amount to \$9,438.

Jana also has monthly income from three sources, other than spousal maintenance: (1) social security retirement benefits (\$874); (2) pension benefits through Robert's civil service retirement plan (\$1,963); and (3) investment income (estimated at \$2,875). The district court found that her monthly gross income is \$5,712 and her monthly net income is approximately \$4,342. The district court also imputed monthly income of \$1,564 to Jana because she used income-producing assets to purchase and improve a lake cabin and to make other purchases.

At the time of the divorce, Jana's monthly living expenses were \$6,476. In response to Robert's motion, Jana claimed monthly expenses of \$7,065. Included in that amount is \$2,000 in payments on her credit card debt of approximately \$21,000. Approximately \$1,100 of her monthly expenses is associated with a lake cabin in northern Minnesota, which she purchased in 2002.

In November 2006, the district court issued an order terminating Robert's spousal maintenance obligation but ordering him to continue paying Jana's monthly health insurance premium of \$271. Jana moved for amended findings. In February 2007, the district court reduced the amount of income imputed to Jana but otherwise denied her motion. Jana appeals.

D E C I S I O N

The relevant statute provides:

The terms of an order respecting maintenance or support may be modified upon a showing of one or more of the following, any of which makes the terms unreasonable and unfair: (1) substantially increased or decreased gross income of an obligor or obligee; (2) substantially increased or decreased need of an obligor or obligee

Minn. Stat. § 518A.39, subd. 2(a) (Supp. 2007) (formerly Minn. Stat. § 518.64). A district court may modify spousal maintenance if a party (1) shows a substantial change in circumstances and (2) demonstrates that the change in circumstances renders the existing maintenance amount unreasonable and unfair. *Hecker v. Hecker*, 568 N.W.2d 705, 709 (Minn. 1997); *Savoren v. Savoren*, 386 N.W.2d 288, 291 (Minn. App. 1986).

Appellate courts review a district court's maintenance award under an abuse-of-discretion standard. *Dobrin v. Dobrin*, 569 N.W.2d 199, 202 (Minn. 1997); *Stich v. Stich*, 435 N.W.2d 52, 53 (Minn. 1989); *Erlandson v. Erlandson*, 318 N.W.2d 36, 38 (Minn. 1982). 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*, 569 N.W.2d at 202 (citing *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988)). "Findings

of fact concerning spousal maintenance must be upheld unless they are clearly erroneous.” *Gessner v. Gessner*, 487 N.W.2d 921, 923 (Minn. App. 1992).

Jana challenges the district court’s order in three ways. First, she argues that the district court’s findings regarding the parties’ incomes and expenses were clearly erroneous. Second, she argues that Robert failed to satisfy his burden of proof on the issue whether ongoing spousal maintenance would be unreasonable and unfair under the circumstances. Third, she argues that the district court should have reserved the issue of spousal maintenance.

I. Findings on Incomes and Expenses

Jana challenges four aspects of the district court’s findings concerning the parties’ incomes and expenses.

A. Imputation of Income to Jana

First, Jana argues that the district court erred by imputing monthly income of \$1,564 to her based on a finding that she had depleted and diverted income-producing assets. A court may impute income to a maintenance obligee. *Hecker*, 568 N.W.2d at 710 (reducing wife’s permanent maintenance because of lack of reasonable effort to provide for her own needs). Jana has an obligation to utilize her assets prudently because a maintenance award is to be made in light of “the financial resources of the party seeking maintenance, including . . . the party’s ability to meet needs independently.” Minn. Stat. § 518.552, subd. 2(a).

At the time she purchased the lake cabin, Jana refinanced her primary home and withdrew \$70,000 of equity, using \$40,000 as a down payment and \$30,000 for

improvements and furnishings. At the time of the district court's hearing, Jana had equity of approximately \$190,000 in the cabin. After calculating a 4.6% rate of return on that amount, the district court imputed to her monthly income of \$728 because that equity would be available for investment income if Jana were to divest of the cabin. The district court also imputed monthly income of \$836 to Jana based on her depletion of assets. Between 1995 and 2006, she withdrew \$273,600 from her retirement assets held in IRA accounts. Of that amount, Jana used \$220,000 to pay for taxes, vacations, and miscellaneous expenses.

Jana argues that the district court should not have imputed income to her because these expenses were reasonable. The district court was not persuaded by Jana's claim that her maintenance award was insufficient to pay taxes and other expenses. The district court noted that she never had sought a modification and only once had sought a cost-of-living increase. The district court further found that Jana's spending had outpaced her income and that she had exceeded the marital standard of living by purchasing the cabin. The district court imputed income to Jana for only a portion of the assets she invested in her cabin. Thus, the district court did not abuse its discretion by imputing income to Jana because she had depleted and diverted a portion of her income-producing assets.

B. Assumed Rate of Return

Second, Jana argues that the district court erred by assuming a 4.6% rate of return on her investments when estimating that portion of her retirement income. More specifically, Jana argues that the district court should have used a 2.99% rate of return, which is the rate she actually earned during the preceding two-year period, or 2.15%,

which is the rate she actually earned during the preceding one-year period. Jana contends that the district court erred by speculating that her rate of return would be greater than what it had been recently and that a conservative expected rate of return is necessary in light of the current state of the economy.

Courts consider income generated by a spouse's investments as being available to meet the spouse's needs. *Fink v. Fink*, 366 N.W.2d 340, 342 (Minn. App. 1985). The district court used a 4.6% rate of return because Jana's actual average during the preceding three-year period was 4.56%. In addition, Robert submitted an affidavit of an accountant stating that the parties can reasonably expect to earn an average of 5% per year, based on the rate of return available on treasury bills and the historic rates on high-quality corporate bonds. The determination of the amount of future income that will be generated by investments is an approximation that "need only fall 'within a reasonable range of figures.'" See *Maurer v. Maurer*, 623 N.W.2d 604, 606 (Minn. 2001) (reviewing determination of valuation of asset) (quoting *Hertz v. Hertz*, 304 Minn. 144, 145, 229 N.W.2d 42, 44 (1975)). Thus, the district court's use of a 4.6% rate of return is not clearly erroneous.

C. Reduction of Jana's Expenses

Third, Jana argues that the district court improperly struck from her monthly budget \$2,000 in credit card debt payments and \$1,099 in cabin expenses. On a motion to modify maintenance, the district court must apply the factors for an award of maintenance under Minn. Stat. § 518.552 that exist at the time of the motion, including "the standard of living established during the marriage." Minn. Stat. §§ 518A.39, subd.

2(d) (Supp. 2007), 518.552, subd. 2(c) (2006); *Chamberlain v. Chamberlain*, 615 N.W.2d 405, 409-12 (Minn. App. 2000) (discussing importance of marital standard of living in determining maintenance recipient's reasonable monthly expenses), *review denied* (Minn. Oct. 25, 2000). "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).

The district court found that Jana's claimed expenses associated with the credit card debt and the lake cabin exceed the marital standard of living. The district court stated that the credit card debt indicates "spending that is beyond her means and not in keeping with the parties' practices during the marriage." The record supports the finding that maintaining credit card debt was not part of the marital standard of living. Furthermore, it is undisputed that the parties did not own a second home during their marriage. Jana contends that she can afford a cabin because she downsized her primary residence from a larger home to a townhome in 2006. But the district court found, "It is more expensive to pay for and maintain two separate homes." The district court acted properly in considering the standard of living experienced by Jana and Robert during their marriage. Thus, the reduction of Jana's expenses to account for expenses associated with credit card debt and a second home was not clearly erroneous.

D. Robert's Expenses

Fourth, Jana argues that the district court erred by not reducing Robert's budgeted expenses, particularly with regard to housing and vehicles. As Robert points out, he

would have housing expenses even if he were not remarried. Why Robert's vehicle expenses include money for two cars is less clear. On a motion for modification of maintenance, the court "shall not consider the financial circumstances of each party's spouse, if any." Minn. Stat. § 518A.39, subd. 2(d)(1). Jana contends that one of the vehicles is for Robert's current wife, but the district court found that Robert's claimed expenses were for him alone. Regardless, that fact is not an important part of the district court's analysis of the maintenance issue. A maintenance order may be modified simply upon a showing of substantially decreased need of an obligee. Minn. Stat. § 518A.39, subd. 2(a)(2); *Lyon v. Lyon*, 439 N.W.2d 18, 22 (Minn. 1989). Jana no longer has a need, which means that the district court's findings related to Robert's income and expenses are not material to the decision whether to terminate spousal maintenance. See *Walker v. Walker*, 553 N.W.2d 90, 95-96 (Minn. App. 1996) (holding that husband's earning capacity in retirement need not be considered in case involving reduction of maintenance). We note that Robert voluntarily reduced his claimed monthly expenses from \$18,551 to \$10,938 to reflect expenses within the marital standard, and the district court further reduced Robert's living expenses by \$1,500 by eliminating expenses related to golfing, gifts, and food. Thus, we are unable to conclude that the district court's findings regarding Robert's expenses were clearly erroneous.

II. Termination of Spousal Maintenance

The district court found that Jana did not have a need for continued spousal maintenance and, accordingly, concluded that continued spousal maintenance would be unreasonable and unfair. Jana concedes that Robert has satisfied the first requirement for

termination of spousal maintenance, that he experienced a substantial change of circumstances upon his retirement. See Minn. Stat. § 518A.39, subd. 2 (Supp. 2007). Rather, she argues that Robert failed to satisfy his burden of proof on the second requirement, that ongoing spousal maintenance would be “unreasonable and unfair” under the circumstances. *Id.*

A district court must consider “the financial resources of the party seeking maintenance, including marital property apportioned to the party, and the party’s ability to meet needs independently.” Minn. Stat. § 518.552, subd. 2(a). “A spouse’s ability to pay maintenance does not . . . obviate the statutory mandate that the other spouse’s own independent financial resources must be considered too.” *Lyon*, 439 N.W.2d at 22. The balance between a maintenance recipient’s needs and an obligor’s ability to pay “can only be struck when the [recipient’s] needs are, in fact, determined.” *Bliss v. Bliss*, 493 N.W.2d 583, 587 (Minn. App. 1992), *review denied* (Minn. Feb. 12, 1993).

In determining Jana’s needs, the district court found that her actual net monthly income is \$4,342. The district court found that Jana can meet her monthly reasonable expenses of \$4,237 from those sources of income, even without regard for the \$1,564 of income that was imputed to her. Although Robert may have a continuing ability to pay spousal maintenance, the district court stated that it would not penalize Robert for prudent asset management in light of Jana’s ability to meet her reasonable needs. The district court concluded that to continue Robert’s spousal maintenance obligation “based upon [Jana’s] decisions would be unfair.”

In sum, the district court acted within its discretion when it terminated Robert's spousal-maintenance obligation because of his substantial decline in earned income and Jana's lack of need for continued maintenance. See Minn. Stat. § 518A.39, subd. 2(a); *Kruschel v. Kruschel*, 419 N.W.2d 119, 122-23 (Minn. App. 1988) (holding that husband's retirement warranted modification of maintenance).

III. Request to Reserve Spousal Maintenance

Jana argues that even if this court affirms the district court's conclusion that she did not demonstrate a current need for maintenance, the district court should have reserved spousal maintenance. A district court may "reserve jurisdiction of the issue of maintenance for determination at a later date." Minn. Stat. § 518A.27, subd. 1 (2006). In addition, "Where there is some uncertainty as to the necessity of a permanent award, the court shall order a permanent award leaving its order open for later modification." Minn. Stat. § 518.552, subd. 3. Reservation permits a district court to "later assess and address future changes in one party's situation as those changes arise, without prematurely burdening the other party." *Prahl v. Prahl*, 627 N.W.2d 698, 703 (Minn. App. 2001) (remanding to allow district court to address reservation of maintenance in light of one party's illness). Whether to reserve jurisdiction of the issue of maintenance is within the district court's discretion. *Eckert v. Eckert*, 299 Minn. 120, 124, 216 N.W.2d 837, 839 (1974).

The district court reasonably declined to reserve spousal maintenance because there is no apparent uncertainty concerning Jana's lack of need for spousal maintenance. The income she is receiving from the social security program, from Robert's pension, and

from her investments are reasonably certain. Jana points out that the financial markets and the parties' life spans are uncertain, but such uncertainties always exist and are not the type of contingencies that require a district court to reserve spousal maintenance. See *Catania v. Catania*, 385 N.W.2d 28, 30 (Minn. App. 1986) (holding that district court did not abuse its discretion by not reserving jurisdiction over maintenance). Thus, the district court did not abuse its discretion in declining to reserve spousal maintenance.

Affirmed.