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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A07-0789**

In re the Marriage of: Darla Ann Schmidt, petitioner,  
Appellant,

vs.

Mark Anthony Schmidt,  
Respondent.

**Filed May 13, 2008  
Affirmed in part and reversed and remanded in part  
Peterson, Judge**

Scott County District Court  
File No. 70-FA-05-11733

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Considered and decided by Stoneburner, Presiding Judge; Lansing, Judge; and Peterson, Judge.

## UNPUBLISHED OPINION

**PETERSON**, Judge

In this appeal from a marital-dissolution judgment, appellant wife argues that the district court abused its discretion in awarding maintenance and in denying appellant need-based attorney fees and erred in awarding respondent husband conduct-based attorney fees. We affirm the district court's decisions regarding attorney fees and reverse the maintenance award and remand for further proceedings.

### FACTS

The parties were married in 1987 and are the parents of two minor children who were ages 14 and 11 at the time of the divorce. The parties separated in June 2004 and divorced in December 2006. The district court awarded the parties joint legal and joint physical custody of the children. Using the Hortis/Valento formula,<sup>1</sup> the court awarded wife \$1,324.80 per month in child support based on wife having custody 60 percent of the time and no income. The district court found that wife's reasonable monthly expenses for herself and the children were \$3,800 and that the children's special needs did not prevent wife from working full time. Based on these findings, the court awarded wife temporary spousal maintenance in the amount of \$2,500 per month for six months.

Wife filed a motion for amended findings or a new trial. The district court judge who presided at trial and issued the dissolution judgment retired on December 31, 2006,

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<sup>1</sup> *Valento v. Valento*, 385 N.W.2d 860 (Minn. App. 1986), *review denied* (Minn. June 30, 1986); *Hortis v. Hortis*, 367 N.W.2d 633 (Minn. App. 1985).

and a successor judge considered wife's posttrial motion. The successor judge concluded:

This court, not having presided at the trial, cannot judge "the worth and weight of the testimony," and cannot therefore perform the duties of [the predecessor judge].

The issue then is what to do. Rule 63.01 affords the successor judge the discretion to grant a new trial, and *Kornberg* almost suggests that a new trial should be granted if the successor judge cannot act. In the court's view judicial economy dictates a different result. A motion for amended findings affords the trial judge the opportunity to reconsider its decision and to correct or supplement its findings, and alter its conclusions. Denial of the motion does not preclude the parties from appellate review. In this case the trial judge can never reconsider his findings; but [wife] is not without recourse. If she feels aggrieved she can appeal [the predecessor judge's] decision. If he erred the case will be returned for further consideration or new trial; if not, it will be final. That seems to be the more provident course.

(footnote omitted)<sup>2,3</sup>

This appeal followed.

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<sup>2</sup> Minn. R. Civ. P. 63.01 states that when a judge cannot perform judicial duties after findings of fact and conclusions of law are filed, any other judge can perform those duties, but if the successor judge cannot perform those duties without having presided at trial, the successor judge has discretion to grant a new trial.

<sup>3</sup> *Kornberg v. Kornberg*, 542 N.W.2d 379, 385 (Minn. 1996), states that [c]ertain circumstances might indicate that a judge not reconsider a prior ruling, but instead exercise the discretion to grant a new trial pursuant to Rule 63.01. Such a circumstance exists if reconsideration of a ruling involves a determination of the credibility of witnesses. However, a successor judge has the authority to reconsider and to amend findings of facts when there is no testimony of witnesses requiring the evaluation of credibility.

## DECISION

### I.

A district court may order maintenance if a party lacks sufficient property to provide for the party's reasonable needs or if a party is unable to provide self-support through adequate employment. Minn. Stat. § 518.552, subd. 1(a), (b) (2006). In making this determination, the district court must consider "all relevant factors," including the listed statutory factors. Minn. Stat. § 518.552, subd. 2(a)-(h) (2006). No single factor is dispositive, and the issue is basically the obligee's need balanced against the obligor's financial condition. *Erlandson v. Erlandson*, 318 N.W.2d 36, 39-40 (Minn. 1982). The party seeking maintenance has the burden to produce evidence on the statutory factors at trial. *See Dobrin v. Dobrin*, 569 N.W.2d 199, 202 (Minn. 1997) (stating that statute implicitly places burden on spouse seeking maintenance to prove need for it).

The determination of spousal maintenance is within the district court's broad discretion. *Stich v. Stich*, 435 N.W.2d 52, 53 (Minn. 1989). The district court will not be determined to have abused its discretion with respect to an award of maintenance unless the court's resolution of the issue is "against logic and the facts on record." *Rutten v. Rutten*, 347 N.W.2d 47, 50 (Minn. 1984). "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). An appellate court defers to the district court's credibility determinations. *Vangsness v. Vangsness*, 607 N.W.2d 468, 472 (Minn. App. 2000).

Wife argues that the district court abused its discretion when it denied her permanent spousal maintenance and when it awarded her temporary spousal maintenance of \$2,500 per month for only six months. The memorandum that accompanies the dissolution judgment contains a list of expenses that the district court described as wife's monthly expenses for herself and the children. Wife's listed expenses total \$4,300, and the children's listed expenses total \$2,105, which makes a total budget of \$6,405. The district court found "that, after considering the standard of living established during the marriage, these expenses are not necessary or reasonable." The court then identified several individual expenditures that seemed high or unrealistic. The expenditures on wife's list that the court identified as unreasonable were \$138 for a house-cleaning service and \$275 for clothing; and the expenditures on the children's list that the court identified as unreasonable were \$250 for school supplies and activities; \$300 for sports, recreation, and music; \$300 for gifts and toys; \$100 for entertainment and hobbies; \$50 for allowance; and \$150 for "miscellaneous."

Although the district court found that these expenses were not reasonable, it did not state amounts that would be reasonable. At least some amount is reasonable for several of the categories for the children's expenses and some amount is reasonable for wife's clothing. But even if the full amount of all of the expenses that the district court identified as unreasonable is eliminated from wife's budget, the total reduction is \$1,563. Subtracting \$1,563 from wife's total budget of \$6,405 leaves monthly expenses of \$4,842. The district court found wife's reasonable monthly expenses to be \$3,800 and

did not provide any explanation of unreasonable expenses that account for the difference between \$3,800 and \$4,842.<sup>4</sup>

The district court did not make a specific finding regarding husband's reasonable expenses and stated only that husband submitted monthly expenses in the amount of \$6,066.50 and that some of the expenses submitted were somewhat high. The district court found that husband's net monthly income is \$8,193.42 and then subtracted \$1,324.80 for child support to arrive at a net income for maintenance purposes of \$6,868.62. The court then awarded wife \$2,500 for maintenance, which left husband with \$4,368.62 to pay his expenses.

Wife contends that the district court erred in determining her reasonable monthly expenses because it made no finding on the parties' lifestyle during the marriage. The district court stated that it considered the standard of living established during the marriage when determining the parties' reasonable expenses, but its findings reflect significant differences between wife's budget and husband's budget. "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). This does

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<sup>4</sup> The district court implied that wife's housing costs are not reasonable when it stated in its memorandum that wife "believes it is reasonable that she live in a five bedroom four bath home that is nicely furnished in every room," but the court did not find any of the itemized housing costs to be unreasonable and did not direct that the homestead be sold. It is not apparent how the housing costs can be significantly reduced without selling the homestead.

not mean, however, that a maintenance recipient's reasonable monthly expenses must include every type of expense that the parties incurred while married.

While husband is paying maintenance, the remaining income that he has available to pay his expenses exceeds by \$568.62 the amount that the court determined to be wife's reasonable expenses for herself and the children.<sup>5</sup> And when maintenance payments end after six months, husband will have net income of \$6,868.62 to pay his expenses, which is significantly more than wife's reasonable expenses of \$3,800. Reducing wife's total claimed budget of \$6,405 to \$3,800 while leaving husband with \$6,868.62 to pay a total claimed budget of \$6,066.50 does not allow both wife and husband to have standards of living that approximate the marital standard of living.

It appears that the district court anticipated that wife will be able to make up the shortfall in her budget by returning to work full time. There is a basis for concluding that wife can return to full-time work. The district court found that the children's special needs did not prevent wife from working full time, and wife has a college degree in accounting and business administration and worked outside the home before the children were born. She has also passed the certified public accountant (CPA) examination but has never been licensed as a CPA. But even with monthly expenses of \$3,800, when maintenance ends, wife will need to earn a net monthly income of approximately \$2,500 (which is a net annual income of \$30,000) to meet her monthly expenses.

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<sup>5</sup> Because the parties have joint physical custody, husband's reasonable expenses will almost certainly include expenses for the children, but there are no findings that identify any specific expenses.

Although wife had the burden of proving her need for maintenance, she offered no evidence on the availability or starting salaries for accounting jobs, and she provided no foundation for her opinions that her skills are outdated, her earning capacity is permanently diminished, and her starting salary will be only \$12 per hour. Wife's failure to present evidence on the issue may explain the district court's failure to make a specific finding on wife's income-earning ability. But the district court found that it did not expect that wife would be able to immediately return to her previous level of full-time earnings, which was \$40,000 per year, and if wife does not return to that level of earnings, it is not apparent how she will earn \$2,500 in net monthly income.

It appears that the district court did not find wife credible with respect to her claimed monthly budget and her ability to return to work full time. But based on the findings that the district court made, the maintenance award is against logic and the facts on record. The findings do not explain how leaving wife with a standard of living significantly below husband's standard of living when maintenance ends allows wife and husband to have standards of living that approximate the marital standard of living as closely as is equitable under the circumstances. Furthermore, even if wife's reasonable monthly expenses total \$3,800, the findings indicate that the district court did not expect that wife would be able to immediately earn the amount needed to meet these expenses. Therefore, we reverse the maintenance award and remand for further proceedings.

## **II.**

The district court awarded husband \$3,500 in conduct-based attorney fees. A district court "shall" award need-based attorney fees if the statutory factors are satisfied

and “may” award conduct-based attorney fees against a party whose conduct unreasonably contributed to the length or expense of the proceeding. Minn. Stat. § 518.14, subd. 1 (2006). To award conduct-based fees, the court must identify the offending conduct, the conduct must have occurred during litigation, and it must be found to have unreasonably contributed to the length or expense of the proceeding. *Geske v. Marcolina*, 624 N.W.2d 813, 818-19 (Minn. App. 2001). The district court has broad discretion to impose attorney fees, and, absent an abuse of this discretion, we will not reverse an attorney-fee award. *Geske v. Marcolina*, 642 N.W.2d 62, 71 (Minn. App. 2002).

The district court found:

This matter had been previously scheduled, in February of 2006 for a trial date of June 6, 2006. On May 5, 2006, [wife] made a motion to continue the trial date to allow Dr. Phipps-Yonas to testify as [wife’s] expert witness. [Wife] claimed that Dr. Phipps-Yonas had a conflict with the current trial date and would be unable to testify without a continuance. In an order dated June 2, 2006, [the district court] denied [wife’s] motion for a continuance stating that there had been no showing of “good cause.” [Wife] then appeared for trial with Dr. Phipps-Yonas scheduled to testify as her expert witness. [Husband] argued that Dr. Phipps-Yonas’ report was delivered the day prior to trial and so [husband] was unprepared to properly deal with [wife’s] expert witness. Thus, the trial was continued to allow [husband] this opportunity. [Wife] “sprung” a last-minute witness on [husband] essentially on the trial date and caused the parties to appear in Court three times over an eight-week period to deal with this issue. [Wife’s] actions unreasonably contributed to the length and expense of these proceedings.

Wife argues that husband did not move for conduct-based attorney fees and, therefore, she did not have the opportunity to oppose the award. But husband requested

attorney fees for wife's two motions relating to Phipps-Yonas, and in the order denying wife's motion for a continuance, the district court reserved all undecided motions.

Citing *Kitchar v. Kitchar*, 553 N.W.2d 97, 104 (Minn. App. 1996), *review denied* (Minn. Oct. 29, 1996), wife argues that the district court abused its discretion in awarding fees because husband did not document the amount of fees incurred as a result of wife's motions relating to Phipps-Yonas. But *Kitchar* is factually distinguishable from this case because in *Kitchar*, this court affirmed the denial of conduct-based attorney fees in part because the amount of fees incurred was not documented or stated. *See also Gully v. Gully*, 599 N.W.2d 814, 826 (Minn. 1999) (stating that when district court is familiar with history of case and has access to parties' financial information, it may waive the requirements of Minn. R. Gen. Pract. 119).

Wife argues that she notified husband on May 4, 2006, that she intended to call Phipps-Yonas as a witness. But the notice did not indicate the substance of Phipps-Yonas's testimony. Wife also notes that the continuances in August and September 2006 were due to the parties having success at mediation. But the district court did not consider these continuances when awarding husband attorney fees. Wife has not shown that the district court abused its discretion in awarding conduct-based attorney fees. Therefore, we affirm the award of conduct-based attorney fees.

### **III.**

The court "shall" award need-based attorney fees if it finds that the fees are necessary for the good-faith assertion of rights; the recipient does not have the means to pay the fees; and the party who is ordered to pay the fees does have the means to pay.

Minn. Stat. § 518.14, subd. 1. An award of attorney fees under section 518.14, subdivision 1, “rests almost entirely within the discretion of the [district] 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). Wife requested need-based and conduct-based attorney fees in the amount of \$40,085.42, and the district court denied her request. Wife argues that the denial of need-based attorney fees must have been based on the erroneous assumption that she was required to obtain employment during the parties’ separation.

The district court found:

[Wife] cannot argue that [husband’s] financial situation was better than hers prior to the Judgment and Decree. In the parties’ September 15, 2006, temporary order, [the district court] ordered [husband] to pay [wife] \$2,093 per month for temporary child support and \$1,000 per month for temporary spousal maintenance. [The district court] also ordered that [husband] pay the mortgage, all homestead related expenses including taxes, insurance, utilities and maintenance, and that [husband] was responsible for paying the children’s medical and dental insurance and all uninsured expenses. [Husband’s] net income is \$8,193.42. Thus, [husband] was paying \$3,093 per month directly to [wife], approximately another \$2,300 for the mortgage, utilities and maintenance for the benefit of [wife], which left [husband] with \$2,800 to pay his living expenses. Thus, [wife] was receiving approximately 66% of the parties’ combined net income for the past fifteen months. [Wife] was receiving over \$3,000 per month while essentially having all of her living expenses paid. [Wife] also received additional income during this period doing accounting work. Also, as [husband] correctly pointed out, the Court does not know which of [wife’s] expenses have been paid. It is clear that significant portions have been paid.

The court noted that wife had presented invoices for attorney fees that were apparently fully paid through October or November 2006.

The district court's findings demonstrate that in denying wife's request for attorney fees, the court considered the resources available to the parties during the separation, rather than wife's failure to obtain employment. And wife does not cite any evidence indicating a hardship in paying attorney fees through October or November 2006. Wife has not shown that the district court abused its discretion in denying her need-based attorney fees. Therefore, we affirm the denial of need-based attorney fees.

**Affirmed in part, and reversed and remanded in part.**