STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0187

In re the Marriage of:
Thomas Joseph Daley, petitioner,
Appellant,

vs.

Anne Elizabeth Daley,
n/k/a Anne Elizabeth Patrick-Daley,
Respondent.

Filed January 13, 2009
Affirmed in part, reversed in part, and remanded
Hudson, Judge

Hennepin County District Court
File No. 27-FA-000276366

Kay Nord Hunt, Lommen, Abdo, Cole, King, and Stageberg, P.A., 2000 IDS Center, 80 South Eighth Street, Minneapolis, MN 55402; and

John M. Jerabek, Niemi, Barr & Jerabek, P.A., 510 Marquette Avenue, Suite 200, Minneapolis, MN 55402 (for appellant)

M. Sue Wilson, Amy Yanik Miesel, J. Lee Novelli, M. Sue Wilson Law Offices, P.A., Two Carlson Parkway, Suite 150, Minneapolis, MN 55447 (for respondent)

Considered and decided by Hudson, Presiding Judge; Ross, Judge; and Collins, Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

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

HUDSON, Judge

On appeal after remand in this marital-dissolution proceeding, appellant-father Thomas Daley argues that the district court failed to follow this court's remand instructions, abused its discretion by awarding permanent maintenance to respondent-mother Anne Daley, failed to make the findings required to support an upward deviation from his presumptively appropriate child-support obligation, and abused its discretion by making his support obligation retroactive to January 1, 2006. Father also argues that the district court failed to make the findings necessary to support an award to mother of need-based attorney fees.

Because the district court did not exceed the scope of the remand instructions, we affirm in part. But we reverse in part and remand because we conclude that the findings relating to the maintenance award are incorrect; that the district court did not make findings to support the award of tuition and expenses, which the parties agree is an upward deviation from the presumptively appropriate child-support obligation; that the retroactive award of tuition and expenses was an abuse of discretion; and that the district court did not make findings to support the award of need-based attorney fees. Finally, we also remand mother's motion for appellate attorney fees.

FACTS

The parties married in 1988 and separated in December 2001. Their marriage was dissolved by a March 16, 2004 judgment and decree. That decree found that father's gross annual incomes for the years 2000-2003 ranged from $226,666 to $270,423, and

that mother, who had been a stay-at-home parent throughout the marriage, could work as a bookkeeper, earning about $14 per hour. The decree awarded mother sole legal and physical custody of the parties' four children, set father's monthly child-support obligation at $2,633, and reserved the father's "contribution to the children's parochial school tuition and activities expenses." Based on father's earning history, the decree awarded mother monthly spousal maintenance of $8,200 for two years to allow her to complete the licensure requirements to become a certified public accountant, and directed father to pay, by December 31, 2003, the cost of mother's CPA exam course. The decree also provided for "de novo" review of the maintenance award after 24 months.

According to the decree, a reasonable monthly budget for mother and the four children was $10,200. But mother's expenses at the time of the dissolution exceeded this amount, partially because they included a large mortgage payment on the marital home. Noting that the marital home was not an accurate reflection of the parties' marital lifestyle and that mother would be making a "policy choice" by staying in the home, the district court told mother that she would have to reduce her expenses or meet any additional expenses through her own employment.[1]

[1] In the dissolution proceeding, the dissolution court made many statements from the bench that were in the nature of findings of fact which apparently underlie the dissolution decree's conclusions of law, but which, for reasons that are neither clear nor explained, were not actually included as findings of fact in the dissolution decree. The rules allow some statements made from the bench to be treated as findings of fact. Minn. R. Civ. P. 52.01 (stating that "[i]t will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court or in an accompanying memorandum"). The better practice, however, is to include in a judgment the findings

Father appealed the dissolution decree, and both parties challenged aspects of the maintenance award. This court ruled that the district court failed to find father's net monthly income and ability to pay maintenance, reversed the maintenance award, and remanded for further findings. *Daley v. Daley*, No. A04-832, 2005 WL 757601, at *3 (Minn. App. Apr. 5, 2005). On remand, the district court was given discretion regarding whether to reopen the record. *Id.* at *5.

In May 2005, father provided the district court with information to determine his net income. But the matter was not addressed immediately by the court. The district court judge who had presided over the dissolution proceedings recused himself in response to a motion by mother. And in August 2005, mother filed an "emergency motion," requesting that the district court order father to pay the children's allegedly past-due and ongoing parochial school tuition. No order addressed this motion.

In 2006, a referee was assigned to the case, but, as of March 2007, the remanded issues of father's net income and ability to pay maintenance had yet to be resolved. On March 20, 2007, mother moved for de novo review of maintenance, as allowed by the decree. She also requested that father be ordered to pay the children's parochial school tuition and the expenses for their extracurricular activities, as well as her attorney fees. Mother's motion, and the remanded questions of father's net income and ability to pay maintenance, were addressed at an April 2007 hearing, after which the referee issued a proposed order (1) awarding mother permanent maintenance of $8,700 per month

---

critical to the rulings made in that decree. For purposes of this opinion, we assume that the statements from the bench have been incorporated into the judgment.

retroactive to January 1, 2006; (2) ordering father to pay the children's tuition and extracurricular-activity expenses retroactive to January 1, 2006; (3) directing father to continue to pay monthly child support of $2,633; and (4) awarding mother $11,456.50 in need-based attorney fees. The district court approved the order, and father appeals.

D E C I S I O N

I

This case was remanded for the district court to find father's net income and ability to pay spousal maintenance. *Daley*, 2005 WL 757601, at *3. Father asserts that the district court exceeded its remand instructions by making findings regarding his 2003 gross income.

On remand, a district court must strictly execute the remanding court's instructions without altering, amending, or modifying the mandate. *Halverson v. Vill. of Deerwood*, 322 N.W.2d 761, 766 (Minn. 1982). If, however, a district court does not have "specific directions as to how it should proceed" on remand, it has discretion to "proceed in any manner not inconsistent with the remand order." *Duffey v. Duffey*, 432 N.W.2d 473, 476 (Minn. App. 1988). "Appellate courts review a district court's compliance with remand instructions under the deferential abuse of discretion standard." *Janssen v. Best & Flanagan, LLP*, 704 N.W.2d 759, 763 (Minn. 2005).

On remand, the district court found that father's 2003 gross income was approximately $291,000 and that his net monthly income "before child support and maintenance" was about $17,420. The remand instructions did not address father's gross income, our prior opinion stated that the record could be reopened on remand, and father

submitted income-related information to the district court on remand. Therefore, we conclude that the district court did not act inconsistently with the remand instructions when it addressed father's 2003 gross income on remand, and we reject father's argument that the district court exceeded the scope of the remand.

As father correctly notes, however, the finding of his 2003 gross income made on remand significantly exceeds that in the decree. It is undisputed that the finding made on remand includes what was essentially a one-time taxable relocation benefit. At the dissolution trial, father testified that his employer overpaid his expense accounts, but that the employer agreed to forgive father's resulting debt to the employer on the condition that father paid his own relocation expenses. His employer declared the debt forgiveness as income in 2003, and this income is reflected on father's 2003 Form W-2. Similarly, on remand, father challenged the inclusion in his income of what was functionally a one-time payment.

To be income for purposes of determining a party's ability to pay maintenance, receipt of the funds must be dependable. *McCulloch v. McCulloch*, 435 N.W.2d 564, 566 (Minn. App. 1989) (addressing bonuses); *Lynch v. Lynch*, 411 N.W.2d 263, 266 (Minn. App. 1987) (same), *review denied* (Minn. Oct. 30, 1987). Because a one-time benefit is not a dependable source of income and because father's one-time payment was included in the calculation of his 2003 gross income on remand, the finding of father's 2003 gross income on remand is incorrect. And because the findings of father's net monthly income and ability to pay maintenance on remand were based on the finding of his gross income, the findings of father's net income and ability to pay maintenance are also incorrect.

Therefore, we reverse the findings of father's 2003 gross and net incomes, as well as the finding of his ability to pay maintenance, and remand for a finding of father's 2003 gross income, excluding the one-time benefit, and for findings of father's net income and ability to pay maintenance.

II

Father challenges the award to mother of $8,700 in permanent monthly maintenance. Because we are remanding the findings of father's 2003 gross income and net income, as well as his general ability to pay maintenance, we also remand the amount of the maintenance award for the period starting January 1, 2006. *See Stich v. Stich*, 435 N.W.2d 52, 53 (Minn. 1989) (stating that a finding of an obligor's ability to pay maintenance is required to support a maintenance award and remanding for that finding).

To provide some guidance on remand, we will address certain maintenance-related questions here. *See Moylan v. Moylan*, 384 N.W.2d 859, 865 (Minn. 1986) (addressing questions, in a family-law appeal, to provide "guidance on remand"); *see also In re Stadsvold*, 754 N.W.2d 323, 332 (Minn. 2008) (addressing a question, in a nonfamily-law appeal, to "provide guidance on remand").

In a de novo review of a maintenance award, the district court may consider anything that would be appropriate to consider for an initial maintenance award, including the statutory factors provided in Minn. Stat. § 518.552 (2006). *LeRoy v. LeRoy*, 600 N.W.2d 729, 733 (Minn. App. 1999), *review denied* (Minn. Dec. 14, 1999); *see Lyon v. Lyon*, 439 N.W.2d 18, 22 (Minn. 1989) (addressing the requirements for awarding maintenance). While Minn. Stat. § 518.552 lists factors to be considered in setting the

amount and duration of maintenance, no single factor is dispositive, and the issue is basically the recipient's need balanced against the obligor's financial condition. *Erlandson v. Erlandson*, 318 N.W.2d 36, 39–40 (Minn. 1982).

On remand, the district court stated that the two-year maintenance award in the decree was rehabilitative, explaining that mother's "stated goal, and preference—was to obtain her CPA licensure." An award of temporary maintenance requires the recipient to try to economically rehabilitate. *Hecker v. Hecker*, 568 N.W.2d 705, 710 n.4 (Minn. 1997). But mother asserts that the decree did not contain such a requirement. This is a challenge to the district court's reading of the decree. Whether a decree is ambiguous is a legal question reviewed de novo. *Halverson v. Halverson*, 381 N.W.2d 69, 71 (Minn. App. 1986).

The judgment states:

> [Mother] intends to complete a preparation course to take her C.P.A. examination and complete licensure requirements and seek work as an independent contractor. It is anticipated that this process will take 24 months. The Court expects that at the end of that period, [mother] will have passed her C.P.A. examination, completed the remainder of the licensing process, and obtained work as an independent contractor/C.P.A. on the equivalent of a half-time basis with a salary of $40.00/hour. It is reasonable to fully fund [mother]'s reasonable budget for the two years it will take to complete this process.

The decree also awarded mother two years of spousal maintenance to allow her to try to economically rehabilitate herself and required father to pay for her CPA course.

Because the maintenance award was crafted to provide mother an opportunity to economically rehabilitate herself, these provisions cannot be read in any manner other

than requiring her to try to economically rehabilitate.[2] Therefore, we affirm the district court's determination that the dissolution decree required mother to try to rehabilitate.

Mother asserts that she was unable to earn her CPA license in two years because of her responsibilities as a stay-at-home mother of four children, two of whom are dyslexic. But mother was aware of these facts when she outlined her vocational plans to the dissolution court. *Cf. Hecker*, 568 N.W.2d at 709 n.3 (noting that it was the unexpected nature of the parties' changed circumstances that satisfied the standard for modifying maintenance). Mother also asserts that she was unable to pursue her vocational goals because father was not current in his maintenance obligations. While partially true, father was apparently current by February 2005 and mother still took no steps toward rehabilitation. Similarly, although father was late in his payment of the CPA course, father did eventually pay. But, despite her acceptance of these funds, mother never took the course.

[2] Even if the decree was ambiguous, the district court resolved any ambiguity against mother. And the record supports that finding. *See Landwehr v. Landwehr*, 380 N.W.2d 136, 139–40 (Minn. App. 1985) (stating that determining the meaning of an ambiguous judgment provision is fact question reviewed for clear error). When addressing the meaning of an ambiguous provision, a district court may consider the whole record. *Palmi v. Palmi*, 273 Minn. 97, 103, 140 N.W.2d 77, 81 (1966). Also, when the district court interprets the decree, "full effect must be given to that which is necessarily implied in the judgment, as well as to that actually expressed therein." *Stieler v. Stieler*, 244 Minn. 312, 319, 70 N.W.2d 127, 131-32 (1955). Here, at the dissolution trial, mother testified that she wanted and intended to obtain her CPA license and then would work as an independent contractor out of her home. Consistent with this testimony, the decree awarded mother two years of maintenance to allow her to acquire her CPA license and required father to pay for the licensure course. On this record, a finding that the maintenance award was rehabilitative is not clearly erroneous.

Mother argues that a *Hecker*-based analysis of the amount of her maintenance award is inappropriate here because *Hecker* involved the modification of maintenance, and this case involves a de novo review of maintenance rather than a modification. *See id.* at 708–10 (affirming a district court's ruling increasing a rehabilitative maintenance award and making it permanent where the maintenance recipient refused to try to rehabilitate but where the amount of the award was set at the difference between the recipient's reasonable monthly expenses and what she would have earned if she had rehabilitated). That *Hecker* involved a modification and this case does not is not dispositive. Modification of maintenance involves separate, though related, decisions regarding whether the moving party has satisfied the threshold for modification and, if that threshold has been met, what the amount of the maintenance award should be. *See* Minn. Stat. § 518A.39, subd. 2(a), (d) (Supp. 2007) (reciting the modification threshold and incorporating the maintenance standard of Minn. Stat. § 518.552, respectively). Thus, we reject mother's argument.

Further, we also reject mother's assertion that the fact that *Hecker* involved a stipulated award renders it inapplicable here. While *Hecker* involved a stipulation, the lack of a formal stipulation here does not preclude *Hecker*'s application for two reasons. First, *Hecker* notes that the recipient of an award of temporary maintenance has the duty to try to rehabilitate, regardless of whether the award is stipulated. *Hecker*, 568 N.W.2d at 710 n.4. Second, this record, and particularly mother's testimony regarding her vocational plans, presents a de facto stipulation by mother that she would try to economically rehabilitate herself. As the district court noted: It was mother who

"presented herself as a candidate for rehabilitative maintenance"; the court did not "impose[] it upon her."

On remand, the district court shall address mother's ability to meet her own needs under Minn. Stat. § 518.552, subd. 2(a), *Schallinger v. Schallinger*, 699 N.W.2d 15, 22 (Minn. App. 2005), *review denied* (Minn. Sept. 28, 2005), and related case law.[3]

Further, on remand, any award of spousal maintenance shall provide for de novo review after two years, at which time mother's earning capacity is to be revisited in light of the efforts she should have made by that time to economically rehabilitate herself, as contemplated by the parties and the district court at the time of dissolution. To remove any ambiguity: By providing for review after two years, we anticipate that mother will

[3] Generally, imputing income to a maintenance recipient requires a finding of bad faith on the part of the recipient. *Carrick v. Carrick*, 560 N.W.2d 407, 410 (Minn. App. 1997). The statutory standard for determining a recipient's ability to meet her expenses does not require a finding of bad faith. Here, at the April 30, 2007 hearing, father asked the district court to impute income to mother on remand. Implicit in the parties' arguments to this court on appeal is a disagreement about whether the district court should have used the statutory standard or the imputation standard when addressing mother's ability to support herself. To the extent that the parties' arguments to this court raise this imputation vs. ability to meet expenses argument, it is not properly before this court because it was not made to (or addressed by) the district court. Therefore, we need not address it. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (holding that generally, issues not raised before district court will not be considered on appeal). When addressing the amount of any award of maintenance to mother, the district court should address mother's ability to meet her needs under the statutory standard. In 2004, that ability was found to be $14 per hour. We note, however, that a 2004 finding of mother's ability to support herself may now be stale. Therefore, in addressing mother's ability to support herself for the period since the judgment, the district court shall have the discretion to adjust the $14-per-hour figure as it deems appropriate to reflect any changes in that figure that are equitable as of the time the change would have been equitable. For instance, if mother's ability to support herself in 2007 would have been $16 per hour, then the court may calculate her ability to meet her own needs by considering the $16-per-hour figure as of 2007.

try to economically rehabilitate herself as contemplated by the parties and the district court at the time of dissolution and that, in any de novo review, mother's spousal maintenance award can be adjusted in light of her efforts at rehabilitation, or lack thereof, and any other relevant circumstances.

III

A district court has broad discretion to address issues related to child support. *Rutten v. Rutten*, 347 N.W.2d 47, 50 (Minn. 1984). Minnesota law permits a deviation from the presumptive support obligation. Minn. Stat. § 518A.43, subd. 1 (Supp. 2007).[4] If the court deviates from the presumptive obligation, the court must make written findings, stating: (1) each parent's gross income; (2) the parental income for determination of child support (PICS), under Minn. Stat. § 518A.34(b)(2) (Supp. 2007), of each parent; (3) the amount of the presumptive child support obligation; (4) the reasons for the deviation; and (5) how the deviation serves the best interests of the child. Minn. Stat. § 518A.37, subd. 2 (Supp. 2007). Here, there was a general finding that it was in the children's best interests to continue with their extracurricular activities. But the district court's findings did not identify either parent's PICS, explain the reasons for the deviation, or address how the deviation serves the children's best interests. Because

[4] The child-support laws changed substantially for support matters filed on or after January 1, 2007. 2006 Minn. Laws ch. 280, § 44, at 1145. Here, in August 2005, mother filed an "emergency motion" asking that father be ordered to pay the children's tuition, but no order addressed that motion, and mother apparently abandoned it. *See Hicks v. Hicks*, 533 N.W.2d 885, 886 (Minn. App. 1995) (addressing abandonment of a motion to modify child support). The issue did not come back before the district court for resolution until mother moved for payment of tuition and extracurricular activity expenses in March 2007. Therefore, the 2007 statutes apply here.

the parties agree that the award of tuition and extracurricular expenses constitutes an upward deviation, and because the district court did not make the findings that are statutorily required to support the deviation, we reverse the award of tuition and expenses and remand for the district court to re-evaluate the propriety of the deviation in light of the statutory factors and to make any findings necessary to support any deviation the district court deems appropriate.

Father also contends that the district court abused its discretion by ordering him to pay the expenses and tuition retroactive to January 1, 2006. We agree. Mother's request for tuition and expenses came before the referee after mother filed a motion in March 2007. *See* Minn. Stat. § 518A.39, subd. 2(e) (Supp. 2007) (providing that a modification award may be retroactive to any period during which the motion for modification is pending, but only from the date of service). Mother's affidavit requests payment of the tuition and activities expenses "for the school year 2007-2008, until [the children] graduate from high school." And, at the April 30, 2007 hearing, mother's counsel told the referee that mother was not requesting that father pay the tuition retroactively. Therefore, mother waived retroactive payment of the tuition and expenses. The district court abused its discretion by making the award retroactive to January 1, 2006. If, on remand, the referee determines that an upward deviation is appropriate after considering the statutory factors, the award of tuition and extracurricular activities expenses may not be made retroactive to January 2006.

IV

Lastly, father challenges the award of need-based attorney fees to mother. Need-based attorney fees "shall" be awarded if the district court finds that the fees are necessary for the recipient's good-faith assertion of his or her rights and will not unnecessarily add to the length or expense of the proceedings, that the payor has the means to pay the fees, and that the recipient does not. Minn. Stat. § 518.14, subd. 1 (2006); *Peterka v. Peterka*, 675 N.W.2d 353, 360 (Minn. App. 2004). Here, the district court ordered father to pay $11,456.50 of mother's attorney fees, stating:

> The Court finds that Mother does not have the ability to pay attorney's fees, in spite of income exceeding $135,000 a year. Her budget, or more precisely, the budget herein for her and [the parties' minor children], does not account for any attorney's fees. The Court is also mindful again of the amount of her housing payment approximating $6,000 a month. $11,456.50 is a reasonable amount of attorney's fees. . . . Father has the ability to pay these fees, as set forth in the previous findings demonstrating a positive cash flow every month of a (conservative) minimum of $2,000.

This explanation does not address whether the award of need-based attorney fees is necessary for "the good-faith assertion of the party's rights" or whether it will add to the length or expense of the proceedings. Because the findings do not address all of the statutory criteria, and because other aspects of the case bearing on each parties' financial status are being remanded, we reverse the award of need-based attorney fees and remand for findings on the statutory factors and re-consideration of a fee award in light of those findings. We note that, on remand, each of the statutory factors should be addressed and that mother's "need" for an award of attorney fees must be clearly established,

particularly in light of the district court's oral findings relating to mother's "policy choice" with respect to her high housing costs. Whether to re-open the record on remand shall be discretionary with the district court.

Mother seeks need-based attorney fees on appeal. Father opposes mother's motion. We have discretion to award such fees based on the same statutory factors as the district court. Minn. Stat. § 518.14; *LaChapelle v. Mitten*, 607 N.W.2d 151, 167 (Minn. App. 2000), *review denied* (Minn. May 16, 2000). Because we remand for findings regarding attorney fees for the district court proceedings, and because those findings would impact any award of appellate attorney fees on remand, the district court also shall address mother's request for attorney fees incurred in this appeal. *See Richards v. Richards*, 472 N.W.2d 162, 166 (Minn. App. 1991) ("An award of attorney fees on remand may include fees incurred on the original motion, and fees incurred on appeal."); *see also* Minn. R. Civ. App. P. 139.06 1998 advisory comm. cmt. (stating that appellate court may remand question of attorney fees for appeal).

Affirmed in part, reversed in part, and remanded.