STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0013

In re the Marriage of: Mary Ann McCarney, petitioner,
Respondent,

vs.

Paul Dean Hartleben,
Appellant.

Filed February 17, 2009
Affirmed in part, reversed in part, and remanded
Stauber, Judge

Ramsey County District Court
File No. 62F00600254

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Considered and decided by Stauber, Presiding Judge; Kalitowski, Judge; and Shumaker, Judge.

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

STAUBER, Judge

On appeal in this dissolution matter, appellant-husband challenges the district court's spousal maintenance award to respondent-wife. We affirm in part, reverse in part, and remand.

FACTS

Appellant Paul Hartleben and respondent Mary McCarney met while they were both employed at a medical clinic, appellant as an orthopedic surgeon, and respondent as an orthopedic physician's assistant (OPA). The parties were married in February 1993, and had three children during the marriage. In February 2006, respondent petitioned to dissolve the parties' marriage. Prior to trial, the parties successfully resolved custody and parenting time issues, as well as the division of property. Consequently, the primary issue for trial was spousal maintenance.

At trial, respondent testified that at the time the parties were married, she did not have an undergraduate degree because she was only required to complete an 18-month course at a junior college in order to receive the OPA degree. Respondent claimed that after working for about five years as an OPA, she became dissatisfied with her career choice because the job was physically taxing and not conducive to family life. According to respondent, she wanted to become a licensed psychologist, and in 1990, she began taking classes toward completing her undergraduate degree in psychology.

Respondent testified that after the parties were married, appellant was the primary breadwinner, and she stayed at home with the children and focused her energy on her education. At the time of trial, respondent was working about 30 hours per week at the children's school in an unpaid internship position related to her education. Although respondent had not completed all her requirements to become a licensed psychologist, and let her certification as an OPA expire during the marriage, respondent testified that

her intent is to complete all of the requirements of her education and licensing and ultimately set up her own practice as a psychologist.

Appellant testified that he bought his current practice in 1997, and typically works between 40-60 hours per week. In light of the hard work and strenuous hours associated with being a surgeon, appellant testified that he anticipated retiring by age 59. Appellant also testified that his workload prompted him to consider a career change, and that he completed his Masters Degree in Business during the marriage in anticipation of becoming a swing trader. According to appellant, he managed the family's finances in anticipation of a possible career change, and still hopes to become a swing trader.

In August 2007, the district court issued its order dissolving the parties' marriage. The district court found that appellant has a gross income of approximately $600,000 per year, and that his "current after tax average monthly cash flow is $29,795." The district court then set appellant's child support obligation at $2,576 per month, and awarded respondent $13,075 per month in permanent spousal maintenance, which would ultimately decrease to $4,230 per month in September 2018. Appellant moved for amended findings or a new trial, primarily challenging the district court's spousal maintenance award. The district court denied appellant's motion. This appeal followed.

D E C I S I O N

This court reviews a district court's maintenance award under an abuse-of-discretion standard. *Dobrin v. Dobrin*, 569 N.W.2d 199, 202 (Minn. 1997). "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). In order to successfully

challenge a district court's findings of fact, the party challenging the findings "must show that despite viewing that evidence in the light most favorable to the trial court's findings . . . the record still requires the definite and firm conviction that a mistake was made." *Vangsness v. Vangsness*, 607 N.W.2d 468, 474 (Minn. App. 2000).

I. Maintenance-related findings

An award of spousal mainte

nance depends on a showing of need. *Lyon v. Lyon*, 439 N.W.2d 18, 22 (Minn. 1989). A district court may award spousal maintenance if it finds that the spouse seeking maintenance

> (a) lacks sufficient property, including martial property apportioned to the spouse, to provide for reasonable needs of the spouse considering the standard of living established during the marriage, especially, but not limited to, a period of training or education, or
>
> (b) is unable to provide adequate self-support, after considering the standard of living established during the marriage and all relevant circumstances, through appropriate employment, or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home.

Minn. Stat. § 518.552, subd. 1 (2006). In determining whether a party needs spousal maintenance, a district court is directed to consider "all relevant factors." *Id.*, subd. 2 (2006) (listing eight factors that are relevant for consideration for an award of spousal maintenance). "No single factor is dispositive and each case must be determined on its own facts." *McConnell v. McConnell*, 710 N.W.2d 583, 585 (Minn. App. 2006).

Here, after considering the relevant factors set forth in Minn. Stat. § 518.552, subd. 2, the district court concluded that:

> [Respondent] is awarded the sum of $13,075.00 per month as and for spousal maintenance, beginning July 1, 2007 and continuing until June 31, 2012 or until six months after she becomes fully licensed as a psychologist, whichever occurs first. At that time spousal maintenance will be reduced to $8,705.00 per month adjusted by the cost of living increase or decrease from the date of the entry of the Decree herein to the date of the reduction, and shall continue until August 31, 2018, or until [respondent] sells the homestead . . ., whichever occurs earlier. As of September 1, 2018, spousal maintenance shall be reduced to $4,230.00 per month and shall remain at that level until further order of the Court.

Appellant challenges the district court's findings and conclusion with respect to the amount of maintenance awarded to respondent. Appellant argues that the maintenance award was an abuse of discretion because the district court failed to adequately consider his plans to change careers. We disagree. The district court specifically found that appellant's "plan is to reduce his work as a surgeon and begin self employment as a swing trader." But the court also speculated that "[appellant's] new business venture could possibly earn him more money in fewer hours than his current career." Appellant is still presently employed as a surgeon and, thus, appellant's future plan to change careers is speculative. If circumstances change, appellant can bring a motion to modify his spousal maintenance obligation. Consequently, the district court adequately considered appellant's career-change plans in setting maintenance.

Appellant also contends that the district court failed to make appropriate findings concerning respondent's earning potential. Appellant argues that the district court's

finding that respondent could earn $50,000 per year as a psychologist is clearly erroneous because the record reflects that respondent would be undercompensated earning a salary of $50,000 per year. Appellant argues that the evidence in the record demonstrates that respondent could earn in excess of $60,000 per year as either an OPA or a licensed psychologist, and the district court's refusal to consider respondent's true earning potential was an abuse of discretion.

The record reflects that the OPA position has substantially changed over the past decade. Thus, it is unlikely that even if respondent were able to become re-certified as an OPA, that she would be earning the salary appellant claims she could earn. Moreover, the record reflects that it will take time for respondent to start earning the salary appellant expects her to earn as a PhD-level licensed psychologist. The district court's maintenance award specifically contemplates this timeframe, as the order calls for a gradual reduction in spousal maintenance. The district court made very extensive findings on the issue, and the court's findings are supported by the record. That the record might support findings other than those made by the district court does not render the findings clearly erroneous. *Vangsness*, 607 N.W.2d at 474.

Appellant further argues that the district court's finding that respondent received $130,000 in liquid assets is erroneous because the record reflects that respondent actually received approximately $300,000 in liquid assets. Appellant argues that during the marriage, he was able to earn a 9.1% return on the family's investments, and that the district court's failure to include investment income on the property respondent received as part of the settlement was an abuse of discretion.

Courts normally do not expect spouses to invade the principal of their investments to satisfy their monthly financial needs. *See, e.g., Broms v. Broms*, 353 N.W.2d 135, 138 (Minn. 1984) (affirming monthly maintenance award where the wife lacked sufficient property and her investment income was not enough to meet her annual living expenses). But Minn. Stat. § 518.552, subd. 2(a) (2008), requires the courts to consider financial resources, which includes income generated by liquid assets. *Fink v. Fink*, 366 N.W.2d 340, 342 (Minn. App. 1985). Thus, a consideration of interest or dividend income which may be generated from a marital property award when calculating spousal maintenance does not constitute an abuse of the district court's discretion. *See id.*

Here, respondent concedes that the actual amount of liquid assets that she received is approximately $300,000. Accordingly, a remand is necessary to correct the error. On remand, the district court may choose to adjust the maintenance award in light of possible investment income from this $300,000.

Finally, appellant argues that the district court abused its discretion in adding to respondent's expenses $800 per month for a life insurance premium. We agree. The policy in question insures appellant's life, but is owned by respondent. At the time of the dissolution, the policy had a cash value of approximately $80,000, and respondent was awarded the cash value of this policy as part of her property settlement. Respondent can, at any time, cash out the insurance policy and receive the cash value of the policy. However, when setting appellant's spousal maintenance obligation, the district court added the $800 per month life insurance premium to respondent's expenses. Consequently, by including this $800 per month in appellant's maintenance obligation,

the district court effectively ordered appellant to pay for respondent's investment. Moreover, the record reflects that the premium for the life insurance policy can be paid for out of the policy. Thus, we conclude that the $800 life insurance premium should not be considered in the maintenance award, and we remand the issue of spousal maintenance for proceedings consistent with this opinion.

II. Permanency of maintenance award

The district court has "wide discretion" to determine the duration of a spousal maintenance obligation. *Erlandson v. Erlandson*, 318 N.W.2d 36, 38 (Minn. 1982). But "[w]here 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 (2006). The statute "requires that a [district] court order permanent maintenance if the court is uncertain that the spouse seeking maintenance can ever become self-supporting." *Aaker v. Aaker*, 447 N.W.2d 607, 611 (Minn. App. 1989), *review denied* (Minn. Jan. 12, 1990).

Appellant argues that the district court abused its discretion in awarding permanent spousal maintenance because respondent has the ability to earn sufficient funds to meet her expenses. To support his claim, appellant again argues that respondent could be earning in excess of $60,000-$70,000 per year as an OPA. But maintenance is appropriate upon a showing that a party "is unable to provide adequate self-support, after considering the standard of living established during the marriage and all relevant circumstances, through *appropriate* employment." Minn. Stat. § 518.552, subd. 1(b)

(2006) (emphasis added). "Being capable of employment and being appropriately employed are not synonymous." *Nardini v. Nardini*, 414 N.W.2d 184, 197 (Minn. 1987).

Here, as noted above, respondent is no longer certified as an OPA, and despite appellant's assertions to the contrary, the record reflects that the position has changed substantially during the past decade, making it potentially very difficult for respondent to resume her career as an OPA. Moreover, the record reflects that prior to the parties' marriage, respondent made the decision to abandon her career as an OPA and pursue a career in psychology. The parties were married for approximately 14 years, and respondent did not work during the marriage. Instead, respondent was primarily a homemaker and focused her efforts on her education. The record reflects that respondent had no intentions of returning to work as an OPA, and there is no evidence in the record that respondent is refusing to be employed as an OPA in bad faith. *See Carrick v. Carrick*, 560 N.W.2d 407, 410 (Minn. App. 1997) (precluding district court from finding bad-faith underemployment where person has employment similar to that before dissolution and there is no intentional reduction of income to obtain maintenance). Therefore, it would be inappropriate to force respondent to return to work as an OPA, especially in light of respondent's contribution to the marriage as a homemaker, her substantially completed psychology education, and appellant's ability to pay maintenance.

Appellant also argues that the permanent maintenance award fails to adequately consider respondent's ability to become self-supporting through her career as a licensed psychologist. But as noted above, the maintenance award specifically contemplates

respondent's education and her likely future employment as a psychologist by reducing the amount of maintenance over the next decade. Although the maintenance award is permanent, the court's order specifically provides that the maintenance "award shall be subject to review of the Court under the circumstances described in Minnesota Statutes § 518A.39." Thus, as noted by the district court, appellant can move to modify maintenance should circumstances change.

Finally, appellant argues that the standard of living established during the marriage does not require permanent maintenance. Appellant contends that the parties specifically contemplated a future career change for appellant, and the parties' standard of living reflected this contemplation because the parties saved their money, invested wisely, and did not live a "lavish" lifestyle. Thus, appellant argues that in light of his prospective career change, respondent's likely future employment as a psychologist, and the lifestyle established during the marriage, permanent spousal maintenance was not appropriate.

Appellant is correct in that there is evidence in the record that could support an award of temporary maintenance. But this fact does not mean the district court abused its discretion in awarding permanent maintenance. *See Vangsness*, 607 N.W.2d at 474. The district court found that permanent spousal maintenance was appropriate because "[respondent's] ability to earn income sufficient for her own support is uncertain." In light of the standard of living during the marriage, the court's award of permanent spousal maintenance is supported by the record. The record reflects that respondent will be the children's primary caretaker until their emancipation, and at this point, respondent has not finished her education. Although appellant claims that the parties did not live a

"lavish" lifestyle, the record reflects that appellant's after tax average monthly cash flow at the time of the dissolution was almost $30,000. This income allowed the parties to live a very comfortable lifestyle. Moreover, the district court left the dissolution order open for later modification should respondent become established as a licensed psychologist. *See* Minn. Stat. § 518.552, subd. 3 (stating that "[w]here 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."). We recognize that, unfortunately, marital dissolutions often require parties to change or postpone their plans and goals. Appellant's career change may be delayed and respondent will need to expedite the completion of her degree-work and enter the job market. But on this record, we cannot conclude that the district court abused its discretion in awarding permanent spousal maintenance.

Affirmed in part, reversed in part, and remanded.