STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0565

In re the Marriage of:
Patricia L. Wisness, petitioner,
Respondent,

vs.

Sidney A. Wisness,
Appellant.

Filed March 3, 2009
Affirmed
Halbrooks, Judge

Dakota County District Court
File No. 19-FX-92-013563

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

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

HALBROOKS, Judge

Appellant challenges the district court's denial of his motion to terminate his spousal-maintenance obligation. Because the district court acted within its discretion, we affirm.

FACTS

Appellant Sidney Wisness and respondent Patricia Wisness's 30-year marriage was dissolved by a stipulated judgment and decree on September 17, 1993. The stipulated judgment and decree resolved all issues with the exception of the division of personal property. Appellant was ordered to pay respondent $1,450 per month in permanent spousal maintenance and to maintain a life-insurance policy in the amount of the "present value of his outstanding spousal maintenance obligation," naming respondent as the beneficiary.

In 1996, at age 56, appellant had an opportunity to take early retirement from his position at Dakota Electric. Appellant moved the district court to terminate or reduce his spousal-maintenance obligation. Respondent counter-moved for an increase in spousal maintenance. The district court found that appellant earned approximately $82,000 per year. The retirement package that he was offered provided for approximately a 50% reduction in income until he turned 62 and was eligible for social security. The district court denied both appellant's and respondent's motions, stating that while appellant could take advantage of the retirement opportunity, he could not avoid his obligation to pay

support by voluntarily reducing his income. Following the denial of his motion, appellant opted for early retirement.

In 2007, at age 67, appellant moved the district court to eliminate his spousal-maintenance obligation. Appellant had remarried and was then working part-time as a school-bus driver. He earned $3,271 from this job in 2006. In addition, appellant received $1,481.33 per month in social-security and Medicare payments.

Following a hearing on December 4, 2007, the district court determined that a substantial change in appellant's circumstances had occurred that made the existing spousal-maintenance obligation unreasonable and unfair. The district court found that appellant had retired in good faith, that he had "faithfully paid his spousal maintenance obligations for 14 years," and that his annual income had dropped from approximately $82,000 to $25,000. The district court also found that respondent's monthly income was $845 (excluding spousal maintenance of $1,450), her monthly expenses were $2,700, not including her condominium, and that due to her age, it was unlikely that respondent would be able to find employment and be self-supporting. The district court further found that respondent was unable to meet her needs independently. The district court ordered a 33% reduction in appellant's spousal-maintenance obligation to $971.50 per month. Appellant's obligation to maintain a life-insurance policy to secure the spousal-maintenance obligation remained in effect.

On January 17, 2008, appellant moved the district court for amended findings regarding the parties' incomes and expenses and to terminate his spousal-maintenance and life-insurance obligations. The district court issued an amended order, reducing

appellant's spousal-maintenance obligation to $725 per month and continuing the life-insurance obligation. In its order, the district court added the finding that the parties "enjoyed a high standard of living" during their marriage and that appellant had $1,900 in monthly expenses. In addition, the district court stated:

> It is fair and equitable to reduce [appellant's] spousal maintenance obligation by approximately 50%, in light of both parties[']' present ability to meet their ongoing living expenses. Both parties will have to curtail their expenses or dip into their marital property to make up for the shortfall they each will sustain as a result of this modification of spousal maintenance.

The district court determined that "[a]ccording to Minn. Stat. § 518.64, and the relevant factors listed in § 518.552(2), a reduction in spousal maintenance is appropriate." This appeal follows.

D E C I S I O N

I.

Appellant contends that the district court abused its discretion when it denied his motion to terminate his spousal-maintenance obligation in the amended order. Specifically, appellant argues that the district court erred in calculating respondent's financial resources and both parties' expenses, in finding that the parties had a high standard of living during the marriage, and in setting the amount of spousal maintenance at a level disproportionately high in comparison to his income. An appellate court reviews a district court's order setting or modifying spousal maintenance under an abuse-of-discretion standard. *Erlandson v. Erlandson*, 318 N.W.2d 36, 38 (Minn. 1982). A district court abuses its discretion 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). "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).

Minn. Stat. § 518A.39, subd. 2 (2008), provides:

> (a) 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 . . . .
>
> (b) It is presumed that there has been a substantial change in circumstances under paragraph (a) and the terms of a current support order shall be rebuttably presumed to be unreasonable and unfair if:
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> . . . .
>
> (5) the gross income of an obligor or obligee has decreased by at least 20 percent through no fault or choice of the party; . . . .
>
> . . . .
>
> (d) On a motion for modification of maintenance, including a motion for the extension of the duration of a maintenance award, the court shall apply, in addition to all other relevant factors, the factors for an award of maintenance under section 518.552 that exist at the time of the motion.

It is undisputed that the "support order" mentioned in Minn. Stat. § 518A.39, subd. 2(b), includes a maintenance award. *See* Minn. Stat. § 518A.26, subd. 21(a)(3) (2008).

A. Respondent's income and financial resources

Appellant asserts that the district court's finding as to respondent's income and financial resources is clearly erroneous because the district court failed to consider

respondent's potential income from various retirement accounts and real property. The district court found that respondent "has a monthly income of $845." While the district court did not provide a detailed breakdown of this figure or explain what evidence it considered in making this finding, respondent indicated in an affidavit filed prior to the December 2007 order that she received $745 in social security benefits and $100 as rent from her condominium. Further, appellant's motion for amended findings and supporting memorandum described the potential assets of respondent. This description is sufficient to show that the district court considered the evidence and statutory factors of respondent's financial resources. While appellant argues that the district court failed to adequately consider respondent's retirement accounts and other property, the record shows that appellant provided very little evidence that could support a finding related to respondent's other potential income. Therefore, while it would have been helpful if the district court's findings were more complete, we decline to reverse the district court's finding regarding respondent's ability to support herself on this record. *See Joneja v. Joneja*, 422 N.W.2d 306, 310 (Minn. App. 1988) (noting that the moving party has the burden of proof in maintenance-modification proceedings); *Tuthill v. Tuthill*, 399 N.W.2d 230, 232 (Minn. App. 1987) (noting that a party "cannot complain" when his own failure to produce information prompts, at least partially, denial of his motion to modify maintenance).

B. Respondent's monthly expenses

Appellant argues that the district court's finding as to respondent's monthly expenses is clearly erroneous because her claimed expenses for prescription medication,

rent, and health insurance are not supported by the record. The district court found that respondent had $2,700 in monthly expenses, which, according to the budget that respondent submitted to the district court, includes $800 for prescription medication, $350 for rent, and $363.33 in health-insurance premiums.[1]

1. Prescription medication

Appellant claims that respondent only provided tax records from 2001, 2002, and 2005 to prove the amount of prescription-medication expenses, and based on these records, the expenses should be $231 per month instead of $800. But the record indicates that respondent's tax records from 2004 to 2006 were also filed with the district court, and those records show that respondent's medical and dental expenses for those years were $6,821, $8,262, and $10,614, respectively. In addition, respondent stated by affidavit that her monthly expense for prescription medication is $800, and in her answers to interrogatories, respondent stated that the "[c]ost of prescription drugs for [her] various medical conditions will increase." Therefore, appellant has not demonstrated that the district court's finding regarding respondent's monthly prescription-drug expenses was clearly erroneous.

2. Rent

Appellant claims that there is no evidence in the record supporting the finding that respondent actually paid the $350 in rent that she included in her expenses. In respondent's affidavit, she stated that she is living in the basement of her daughter's

[1] Although the district court's amended order did not itemize respondent's monthly expenses, the total figure is the same as the budget that respondent submitted to the district court.

home and that she "should be paying to [her] daughter" $350 per month in rent. Respondent further stated that she pays her daughter rent when she is able to do so. Paying rent is a reasonable expense and the fact that respondent's daughter allows her to live in her basement does not change the fact that respondent should be paying rent; a party's reasonable monthly expenses for maintenance purposes are not measured by the party's actual expenditures, but by the marital standard of living. Minn. Stat. § 518.552, subds. 1, 2(c) (2008); *see also Chamberlain v. Chamberlain*, 615 N.W.2d 405, 409–12 (Minn. App. 2000) (discussing the importance of the marital standard of living when addressing a maintenance recipient's reasonable monthly expenses), *review denied* (Minn. Oct. 25, 2000). Therefore, the district court finding regarding the rent expense is not clearly erroneous.

3. Health insurance

Appellant argues that the $363.33 in health-insurance premiums claimed by respondent is not supported by the record because respondent's bank records show withdrawals for health insurance of approximately $107 per month. But respondent's tax returns show increases in her medical and dental expenses from 2004 to 2006. These figures could have included respondent's health-insurance premiums. *See* 26 U.S.C. § 213(a), (d)(1)(D) (2006). Further, respondent stated in her answers to interrogatories and affidavit that she paid $363.33 in health-insurance premiums. Therefore, the district court's implicit determination that respondent has a monthly health-insurance premium of $363.33 is not clearly erroneous.

C. Appellant's monthly expenses

Appellant asserts that the district court's finding that his monthly expenses are $1,900 is clearly erroneous because the district court did not include appellant's $640 monthly debt payment and because the amount was less than respondent's expenses. While the district court's findings do not explicitly comment on this claimed expense, appellant's motion for amended findings did mention the monthly debt payment. That is sufficient for us to conclude that the district court considered this evidence. The fact that one individual has higher monthly expenses than another individual in a spousal-maintenance analysis does not necessarily make a finding regarding monthly expenses clearly erroneous. Further, a district court's rejection of debt payment as a monthly expense by itself is not sufficient to show that a finding is clearly erroneous.

D. Appellant's ability to meet his needs and pay spousal maintenance

Appellant argues that he should not have to pay spousal maintenance because his expenses are $183 less than his gross income. In *Ganyo v. Engen*, this court affirmed a maintenance award that resulted in a shortfall for the obligor. 446 N.W.2d 683, 687 (Minn. App. 1989). Here, the district court acknowledged this situation and indicated that "[b]oth parties will have to curtail their expenses or dip into their marital property to make up for the shortfall they each will sustain as a result of this modification of spousal maintenance." Based on this statement, the district court did recognize and weigh the circumstances. Indeed, the district court's findings suggest that respondent's post-maintenance monthly deficit is greater than appellant's. Therefore, on this record, we

will not reverse the district court's refusal to terminate appellant's maintenance obligation.

E. High standard of living

Appellant contends that the district court's finding that the parties had a "high standard of living" is clearly erroneous because there was no evidence presented by either party on this issue. When making findings regarding spousal maintenance, a district court can rely on evidence from prior proceedings. *Lee v. Lee*, 749 N.W.2d 51, 59 (Minn. App. 2008) (stating that a district court's use of findings from a prior hearing was valid), *review granted* (Minn. June 25, 2008). The July 30, 1992 order for temporary relief stated, among other things, that prior to their divorce, the parties owned a Crestliner boat and rental property in Arizona. On this record, appellant has not shown the finding regarding the parties' marital standard of living to be clearly erroneous.

II.

Appellant contends that the district court erred by continuing to require appellant to maintain a life-insurance policy to secure his spousal-maintenance obligation. We have held that a district court has discretion to consider whether to secure a spousal-maintenance award with a life-insurance policy. *Laumann v. Laumann*, 400 N.W.2d 355, 360 (Minn. App. 1987), *review denied* (Minn. Nov. 24, 1987). Here, appellant's argument is based on the assumption that the district court erred by not terminating the spousal-maintenance award. Because we conclude that the district court did not abuse its discretion by awarding a reduced amount of spousal maintenance, the district court's decision to continue the life-insurance requirement was not an abuse of discretion.

III.

Appellant asserts that the district court abused its discretion by admitting an affidavit from respondent to which an unsigned letter from respondent's physician was attached. All "[s]upporting and opposing affidavits shall be made on personal knowledge." Minn. R. Civ. P. 56.05. But to prevail on appeal, an appellant must show both error and prejudice resulting from that error. *Midway Ctr. Assocs. v. Midway Ctr., Inc.*, 306 Minn. 352, 356, 237 N.W.2d 76, 78 (1975); *see also Braith v. Fischer*, 632 N.W.2d 716, 724 (Minn. App. 2001) (applying this concept in a family-law appeal), *review denied* (Minn. Oct. 24, 2001). Appellant has provided no argument describing the prejudice he has suffered. Therefore, his argument is inadequate to require reversal. Moreover, the record does not show any prejudice to appellant. The district court, despite being presented with respondent's affidavit detailing a number of health concerns, never mentioned respondent's health issues. Rather, when the district court addressed respondent's inability to find work, it referenced only respondent's age. We see no abuse of discretion by the district court on this issue. But even if the district court did abuse its discretion, under these circumstances, any error by the district court can be ignored under Minn. R. Civ. P. 61 as harmless.

Affirmed.